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No.

In the Supreme Court of the United States

IN RE ADOPTION OF G.V.

JASON AND CHRISTY VAUGHN,
Petitioners,

v.

BENJAMIN J. WYREMBEK,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ohio Supreme Court, in affirming the stay and ultimate dismissal of the pending adoption of Grayson by the Petitioners, violated the substantive and procedural due process rights of Petitioners by failing to: (1) consider Petitioners' fundamental right and liberty interest in the integrity of their family unit, and (2) provide Petitioners with notice and a hearing?

2. Whether the Ohio Supreme Court, in affirming the stay and ultimate dismissal of the pending adoption of Grayson by the Petitioners, violated the substantive and procedural due process rights of minor child Grayson by failing to: (1) consider his fundamental right and liberty interest in the integrity of his family unit, and (2) provide Grayson with notice and a hearing?

3. Whether the Ohio Supreme Court misapplied U.S. Supreme Court precedent to bestow constitutional rights upon a putative father who has no such rights under either the United States Constitution or Ohio state law?

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All parties appear in the caption of the cases on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A and Appendix C to the petition and are reported at 2010-Ohio-3349, 933 N.E.2d 245 and 2010-Ohio-4879, 937 N.E.2d 1285, respectively. The decision and judgment of the court of appeals appears at Appendix B and is not officially reported but is available at 2009-Ohio-6338.

JURISDICTION

The date on which the highest state court decided the case was July 22, 2010, and a copy of the opinion appears at Appendix A.

A timely motion for reconsideration was thereafter denied on October 7, 2010, and a copy of the opinion denying the motion for reconsideration appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Ohio Revised Code Annotated (1996):

(A) A man is presumed to be the natural father of a child under any of the following circumstances:

> (1) The man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement. . . .

Ohio Rev. Code Ann. § 3111.03.

As used in sections 3107.01 to 3107.19 of the Revised Code:

. . .

(H) "Putative father" means a man, including one under age eighteen, who may be a child's father and to whom all of the following apply:

(1) He is not married to the child's mother at the time of the child's conception or birth;
(2) He has not adopted the child;

(3) He has not been determined, prior to the date a petition to adopt the child is filed, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative agency proceeding in another state;

(4) He has not acknowledged paternity of the child pursuant to sections 3111.21 to 3111.35 of the Revised Code.

Ohio Rev. Code Ann. § 3107.01.

Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:

(A) The mother of the minor;

(B) The father of the minor, if any of the following apply:

(1) The minor was conceived or born while the father was married to the mother;

(2) The minor is his child by adoption;

(3) Prior to the date the petition was filed, it was determined by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative proceeding in another state that he has a parent and child relationship with the minor;

(4) He acknowledged paternity of the child and that acknowledgment has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code.

(C) The putative father of the minor;

(D) Any person or agency having permanent custody of the minor or authorized by court order to consent;

(E) The minor, if more than twelve years of age, unless the court, finding that it is in the best interest of the minor, determines that the minor's consent is not required.

Ohio Rev. Code Ann. § 3107.06.

A man who has sexual intercourse with a woman is on notice that if a child is born as a result and the man is the putative father, the child may be adopted without his consent pursuant to division (B) of section 3107.07 of the Revised Code.

Ohio Rev. Code Ann. § 3107.061.

The department of job and family services shall establish a putative father registry. To register, a

putative father must complete a registration form prescribed under section 3107.065 of the Revised Code and submit it to the department. The registration form shall include the putative father's name; the address or telephone number at which he wishes to receive, pursuant to section 3107.11 of the Revised Code, notice of a petition to adopt the minor he claims as his child; and the name of the mother of the minor.

A putative father may register before or not later than thirty days after the birth of the child. No fee shall be charged for registration.

On receipt of a completed registration form, the department shall indicate on the form the date of receipt and file it in the putative father registry. The department shall maintain registration forms in a manner that enables it to access a registration form using either the name of the putative father or of the mother.

Ohio Rev. Code Ann. § 3107.062.

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or

the placement of the minor in the home of the petitioner.

(B) The putative father of a minor if either of the following applies:

> (1) The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 of the Revised Code not later than thirty days after the minor's birth;
>
> (2) The court finds, after proper service of notice and hearing, that any of the following are the case:
>
> > (a) The putative father is not the father of the minor;
> >
> > (b) The putative father has willfully abandoned or failed to care for and support the minor;
> >
> > (c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first. . . .

Ohio Rev. Code Ann. § 3107.07.

STATEMENT OF THE CASE

Grayson was born on October 29, 2007 at St. Luke Hospital in Lucas County, Ohio to Drucilla Bocvarov. On November 1, 2007, Ms. Bocvarov executed a permanent surrender of Grayson and asked a private adoption agency, Adoption by Gentle Care, to take

permanent custody of the three-day-old infant. (Appx. D). Ms. Bocvarov had been in consultation with Adoption by Gentle Care for months prior to the birth of Grayson, and had, in fact personally selected the Petitioners to be the adoptive parents of her unborn child. In fact, Petitioners were at the hospital the day of Grayson's birth, holding him in the delivery room just after he was born.

On November 4, 2007, Jovan Bocvarov, the child's legal father, executed a permanent surrender of Grayson in which he indicated that he was not the child's biological father. (Appx. E). At the time the permanent surrenders were executed, Drucilla and Jovan Bocvarov were recently divorced. However, Jovan was presumed to be the legal father pursuant to Ohio Rev. Code 3111.03(A)(1) because he was married to Drucilla at the time the child was conceived. *In re Matter of the Adoption of G.V.*, 2009 WL 4447562, * 1 (Ohio App. 6 Dist. 2009).

On November 4, 2007, Grayson was legally placed with the Petitioners for the purpose of adoption. Since Petitioners reside in the State of Indiana, the interstate placement required compliance with the Interstate Compact on the Placement of Children ("ICPC"). The placement received ICPC approval on November 8, 2007. (Appx. F).

On November 15, 2007, Respondent Wyrembek timely registered with the Ohio Putative Father Registry. *Adoption of G.V.*, 2009 WL 4447562 at * 1. Prior to registering with the Ohio Putative Father Registry, Respondent had made no efforts to be involved in the prenatal care of the child's birth-mother, had provided no monetary support to the

birth-mother, and had made no efforts to see the newborn child. In fact, Respondent cut off all communication with the birth- mother during her pregnancy, despite knowing she was pregnant with his biological child. It was not until after the child was placed with the Petitioners for adoption that Respondent attempted to assert any rights regarding the child.

On December 28, 2007, Respondent filed a "Parentage Complaint: Petition to Establish Parental Rights and for Other Relief" in the Fulton County Court of Common Pleas, Juvenile Division. *Id.* Between registering with the Ohio Putative Father Registry on November 15, 2007, and filing his parentage action on December 28, 2007, Respondent made no efforts to locate or contact Grayson or provide any financial support for Grayson.

On January 16, 2008, Petitioners filed a petition for adoption in the Lucas County Court of Common Pleas, Probate Division. (Appx. G). Prior to Petitioners' filing of the adoption petition on January 16, 2008, Respondent had still made no effort to locate, contact, or provide any financial support for Grayson. In Petitioners' adoption petition, Petitioners specifically argued that the consent of Respondent, as the putative father, was not required pursuant to Ohio Rev. Code Ann. § 3107.07(B)(2), since he had "willfully abandoned" and "failed to care for and support the minor child" and "willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first." (Appx. G).

On February 21, 2008, the Fulton County Juvenile Court transferred the parentage proceedings initiated by Respondent to the Lucas County Court of Common Pleas, Juvenile Division. *Adoption of G.V.*, 2009 WL 4447562 at * 1. On April 23, 2008, Respondent filed objections to the adoption. On May 19, 2008, the Lucas County Probate Court stayed the adoption proceedings pending determination of paternity by the Lucas County Juvenile Court. *Adoption of G.V.*, 2009 WL 4447562 at * 1. Thereafter, the juvenile court directed Petitioners, Respondent, the child's birth mother and the individuals or agency with possession of Grayson to present themselves and the child for genetic testing as directed by the court. *Id.* Petitioners conditionally agreed to the DNA test for the limited purpose of establishing a social and medical history for Grayson. On March 17, 2009, the juvenile court issued a judgment entry declaring Respondent to be the biological father of Grayson. The juvenile court then dismissed the proceedings in that court due to the pending adoption. *Id.*

On June 2, 2009, a hearing was held in the probate court to address Respondent's objections to the adoption. This hearing only addressed the legal issues raised by the parties concerning the status and rights of Respondent in the adoption proceeding and specifically did not include either an evidentiary hearing on the petition or a determination of the best interest of the child. On June 4, 2009, the probate court issued the judgment entry, which is the ultimate subject of this Petition, dismissing the petition for adoption. (Appx. H). At no point during the nineteen months of Grayson's life prior to the June 4, 2009 order of the probate court did Respondent initiate

contact with Grayson or attempt to provide him meaningful financial support.[1]

In dismissing the petition, the probate court, in direct conflict with prior precedent of this Court, elevated Respondent's status from putative father with limited Constitutional rights concerning the adoption of Grayson, to that of legal father with full Constitutional rights concerning the parenting and adoption of Grayson. *Adoption of G.V.*, 2009 WL 4447562 at * 1-2. Specifically, the probate court found that since Respondent was determined to be the biological father of Grayson while the adoption proceeding was stayed and not final, his legal status as putative father at the time the adoption petition was filed was meaningless. Instead, Respondent became a legal father with the filing of the juvenile court's March 17, 2009 order, and pursuant to Ohio Rev. Code. Ann. § 3707.07(A), his consent to the adoption was required unless he "has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the child as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the petition for adoption or placement of the minor in the home of the petitioner." *Id.*

The probate court made its finding despite the allegation of Respondent's complete abandonment of the birth-mother before Grayson's birth and Grayson

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[1] Respondent mailed one "support" check in the amount of $25.00 directly to the Petitioners dated October 11, 2008. Prior to the probate court's June 4, 2009 order, Respondent made no attempts to contact, let alone form a parental relationship with, Grayson.

himself for all of his young life. The probate count found that the one-year statutory period of nonsupport that obviates the requirement to obtain parental consent to adoption did not begin to run until the judicial ascertainment of paternity on March 17, 2009. As a result, the probate court determined the adoption petition filed by Petitioners prior to this ascertainment of paternity was premature and dismissed the pending adoption without notice or opportunity for a hearing. *Adoption of G.V.*, 2009 WL 4447562 at * 2. In making this determination, the probate court specifically cited and relied on prior precedent of this Court, including: *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982); and *Lehr v. Robertson*, 463 U.S. 248 (1983). (Appx. H).

Petitioners timely appealed the dismissal of the pending adoption to the Sixth Appellate District Court in Ohio. *Adoption of G.V.*, 2009 WL 4447562 at * 1. In their appeal, Respondents specifically argued that their due process rights were violated by the probate court and that the probate court erred in elevating Respondent's status from that of putative father to father in direct contravention of relevant Ohio Statutes and U.S. Supreme Court jurisprudence. (Appx. I); 2009 WL 4447562 at * 2, 4. Without more than a passing reference to these arguments, the Sixth Appellate District Court in Ohio affirmed the dismissal of the adoption on November 30, 2009. 2009 WL 4447562 at * 4.

Respondents timely appealed the ruling of the Sixth Appellate District Court in Ohio to the Ohio Supreme Court. (Appx. J). In their appeal to the Ohio Supreme Court, the Petitioners again argued that their due process rights were violated by the probate

court and that the probate court erred in elevating Respondent's status from that of putative father to legal father entitled to sole custody of his child in direct contravention of relevant Ohio Statutes and the U.S. Constitution. (Appx. K). On July 22, 2010, in a four to three decision, with three dissenting opinions, the Ohio Supreme Court affirmed the dismissal of the adoption on the grounds relied upon by the probate court. *In re Adoption of G.V.*, 126 Ohio St. 3d 249, 933 N.E.2d 245 (2010). In making this determination, the Ohio Supreme Court expressly relied on prior precedent of this Court, including: *Santosky v. Kramer*, 455 U.S. 745 (1982); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (Brennan, J., dissenting); and *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996).

On October 7, 2010, again in a four to three decision, with no opinion issued by the Court, the Ohio Supreme Court denied the Motion for Reconsideration. *In re Adoption of G.V.*, 2010 Ohio 4879, 2010 WL 3928685 (October 7, 2010). In denying the motion for reconsideration, the Ohio Supreme Court lifted the stay it had previously issued in the case. *Id.* at *1; *Adoption of G.V.*, 126 Ohio St. 3d 1576 (September 28, 2010). As a result, the juvenile court ordered the Petitioners to immediately begin transferring custody of Grayson, whom they had raised as their own child for the entirety of his life, to the Respondent. Petitioners completed the transfer the day after Grayson's third birthday on October 30, 2010. Despite repeated requests, Petitioners have had no contact with Grayson since that day.

REASONS FOR GRANTING THE WRIT

As this Court recognized a decade ago, "[t]he demographic changes of the past century make it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion). Today a tremendous number of children are born into non-traditional biological nuclear families. In fact, over 41 percent of all children born in the United States in 2009 were born to unmarried mothers. National Vital Statistics Reports 59, U.S. Department of Health and Human Services, BIRTHS: PRELIMINARY DATA FOR 2009, p. 5 (December 21, 2010). Over the past forty years, this Court has developed a body of jurisprudence regarding the issue of parental rights when the traditional notion of two biological parents in a married union does not exist. However, the Court has not specifically considered the rights of prospective adoptive parents and the children they seek to adopt. Yet, families with adopted children comprise 1.7 million American households and contain 2.1 million adopted children. Kreider, R.M., ADOPTED CHILDREN AND STEPCHILDREN: 2000, Census 2000 Special Reports CENSR-6RV, U.S. Census Bureau, p. 2, 18-19 (2003). This petition presents the Court with an opportunity to answer questions based on its prior jurisprudence concerning parental rights in these non-traditional families that state and federal courts nationwide have struggled with for decades.

Since deciding *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 431 U.S. 816 (1977), thirty-three years ago, the Court has left open the issue of constitutionally protected fundamental rights and liberty interests for non-biological parents. Although in *OFFER* the Court

noted that a foster parent's "claim to a constitutionally protected liberty interest raises complex and novel questions," the Court declined to rule on the existence of said right. 431 U.S. at 847. Similarly, in *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989), the Court also declined to "decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." As detailed in sections I and II below, this petition directly raises these undecided issues – issues of national significance that have been decided in conflicting opinions in multiple states, requiring clarification from this Court.

In 1983, this Court upheld the constitutionality of putative father registries in *Lehr v. Robertson*, 463 U.S. 248 (1983). Today, putative father registries exist in at least thirty-three states, providing statutory guidelines for courts to determine the parental rights of unmarried fathers. Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, Appendix (2007). As detailed in section III below, many courts of these states have relied on *Lehr* and related Supreme Court jurisprudence to approve adoptions over the objection of biological fathers, refusing to allow biological paternity alone to establish constitutional parental rights. At the same time, in the ruling appealed here, the Ohio Supreme Court essentially eliminated the putative father registry of Ohio by allowing a putative father to retroactively change his status to legal father fourteen months after a petition for adoption was filed based solely on the results of a DNA test. These conflicting cases, based on interpretations of the same U.S. Supreme Court jurisprudence, require clarification from this Court.

I. IT IS A QUESTION OF NATIONAL SIGNIFICANCE WHETHER PROSPECTIVE ADOPTIVE PARENTS WHO HAVE AN ESTABLISHED FAMILY UNIT WITH THEIR PROSPECTIVE ADOPTIVE CHILD HAVE A FUNDAMENTAL RIGHT AND LIBERTY INTEREST IN THE SANCTITY OF THEIR FAMILY GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

"The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65. The Court has repeatedly recognized that under the Due Process Clause of the Fourteenth Amendment, parents have a liberty interest in, and fundamental right to, make decisions concerning the care, custody, and control of their children. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Santosky*, 455 U.S. at 753; *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Troxel*, 530 U.S. at 66. As the Court explained in *Michael H.*: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." 491 U.S. at 123-124. In other words, the decisions of the Court finding that various aspects of family life are deserving of substantive due process protection "rest not upon . . . isolated factors but upon the historic respect – indeed, sanctity would not be too strong a term – traditionally accorded to the

relationships that develop within the unitary family." *Id.* at 123.

A. Prospective Adoptive Parents Have the Same Liberty Interest and Fundamental Right in the Sanctity of Their Family as Natural Parents.

While a majority of cases before this Court concerning the due process rights of parents have naturally focused on the rights of biological parents, the Court has not foreclosed the possibility that non-biological parents in a parent-role can assert these rights. As mentioned above, this Court in *OFFER* examined the rights of foster families in the sanctity of their family, explaining:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster case as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

OFFER, 431 U.S. at 844 (quoting *Yoder*, 406 U.S. at 231-233). *See also, Lehr*, 463 U.S. at 258 ("the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.") Although the Court in *OFFER* declined to rule on the issue of fundamental rights for foster parents and their children, it did so not because the family unit was not deserving of protection, but because the family unit at issue – a foster family – was a state-created family who, by the laws of New York, was intended to be temporary. *See OFFER*, 431 U.S. at 846-47.

In the case presented here, the Court is not dealing with such a state-created family. Instead, the Petitioners were hand-selected by the birth-mother, through a private adoption agency, to be the adoptive parents of her unborn child. Judicial approval was not required for the placement. It is only because the adoption occurred across state lines that state compact administrators from Ohio and Indiana even reviewed the placement. Per the Interstate Compact for the Placement of Children ("ICPC"), prospective adoptive parents must undergo evaluations by licensed social workers for suitability, and both the sending state and receiving state must approve the placement.[2] 5 A.L.R.6th 193 (2010). Petitioners followed all ICPC requirements and both Ohio and Indiana ICPC administrators gave approval for the private adoptive placement of Grayson with the Petitioners. (Appx. F).

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[2] The ICPC was drafted by a group of social service administrators in response to problems encountered by state social service agencies regarding legal authority and child welfare when placing children across state lines. 5 A.L.R.6th 193 §§ 3.2, 3.4 (2010).

The differences between Petitioners and the foster parents in *OFFER* are not restricted to the private and intentional creation of the Petitioners' family, however. Unlike the foster parents in *OFFER*, who received the children on a temporary basis, with the natural parents having the "absolute right to the return of the child," both legal parents of Grayson voluntarily terminated their parental rights and consented to the adoption. *OFFER*, 431 U.S. at 846. As outlined above, Jovan Bocvarov, who was married to the birth mother at the time of conception, was the legal father of Grayson at the time the adoptive placement was made and when the adoption petition was filed. Ohio Rev. Code Ann. § 3331.03 specifically provides that a "man is presumed to be the natural father of a child . . . [if t]he man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by . . . divorce. . . ." Per § 3111.03, Jovan Bocvarov was the legal father of Grayson until the juvenile court ruled otherwise on March 17, 2009. In accordance with this statutory definition, a search of the putative father registry was not required to finalize the adoption since the mother was married at the time of conception. Ohio Rev. Code Ann. § 3107.064(B)(1).

The determination by the Legislature of the State of Ohio that a husband of a marriage should be given preferential treatment concerning the parental rights of any child born into that family, whether biologically his or not, is constitutional and has been approved by this Court: "Where . . . the child is born into an extant marital family, the natural father's unique opportunity [to develop a relationship with his offspring] conflicts with the similarly unique opportunity of the husband

of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter." *Michael H.*, 491 U.S. at 128-129. Ohio's statutory preference for giving the man married to the birth-mother of a child at the time the child was conceived status as the legal father is constitutional. Based on this constitutional preference, the legal father in this case made the voluntary decision, in consultation and in concert with the birth-mother, to place his legal child with the Petitioners.

Based on the legal private placement of Grayson in their home, the approval of the placement through the ICPC, and the voluntary termination of the parental rights of Grayson's legal father and mother, Petitioners, unlike the foster parents in *OFFER*, had an expectation that their family unit was permanent. In a situation such as this, where Petitioners had every reason to believe their adoption of Grayson was permanent, this Court should find compelling reasons to determine whether Petitioners, as prospective adoptive parents, have a fundamental right and liberty interest in the sanctity of their family triggering substantive and/or procedural due process protection under the Fourteenth Amendment.

B. State Courts Across the Country Have Determined Prospective Adoptive Parents Have Due Process Rights in the Sanctity of Their Family.

Since this Court's ruling in *OFFER*, several state courts have found that prospective adoptive parents like the Petitioners here have a protected liberty interest in the sanctity of their family deserving of some form of due process protection under the

Fourteenth Amendment. For example, various state courts in California have repeatedly held that "it is well established that a prospective adoptive parent with whom a child has been placed for adoption has a liberty interest in continued custody." *Adoption of Baby Girl B.*, 74 Cal. App. 4th 43, 51, 87 Cal.Rptr.2d 569 (1999); *Adoption of Baby Boy D.*, 93 Cal. App. 4th 1, 10, 112 Cal.Rptr.2d 760 (2001); *see also L.A. County D.C.F.S. v. Superior Court*, 62 Cal. App. 4th 1, 17, 72 Cal.Rptr.2d 369 (1998) ("prospective adoptive parents are constitutionally entitled to notice and a hearing if an agency seeks to remove a child from their home even before a formal petition for adoption has been filed") (quoting *Jinny N. v. Superior Court*, 195 Cal. App. 3d 967, 971, 241 Cal.Rptr. 95 (4th Dist. 1987)); *Guardianship of Ann S.*, 45 Cal. 4th 1110, 1136, 202 P.3d 1089 (2009) ("guardian, after fulfilling a parental role for an extended period, has also developed substantial interests that the law recognizes").

Similarly, other state and federal courts have determined that at a minimum, prospective adoptive parents are afforded procedural due process protection under the Fourteenth Amendment and are entitled to notice and a hearing before their prospective adoptive child is removed from their home. *See In re the welfare of Elizabeth M.*, 1999 WL 958487, *5 (Wash. App. Div. 3 1999) (unpublished opinion) (prospective adoptive parent was entitled to a hearing on the best interests of the child prior to denial of the adoption petition); *Thelen v. Catholic Social Services*, 691 F.Supp. 1179, 1184-1185 (E.D. Wis. 1988) (under Wisconsin law, the prospective adoptive couple has a limited constitutionally protected liberty interest in their family unit prior to approval of the adoption). *See also In re Dependency of J.B.S.*, 123 Wash.2d 1, 11, 863

P.2d 1344 (1993) (to the extent a biological parent's rights conflict with the child's, the child's best interests are paramount). Some courts have even found that foster families are deserving of due process protection. *See Spielman v. Hildebrand*, 873 F.2d 1377, 1384-1385 (10th Cir. 1989) (preadoptive placement with a foster parent creates reasonable expectations of permanency "meriting limited due process protection"); *McLaughlin v. Pernsley*, 693 F. Supp. 318, 325-327 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989) (holding foster parents had liberty interest in foster family relationship requiring notice and a hearing); *Brown v. County of San Joaquin*, 601 F. Supp. 653, 664-65 (E.D. Cal. 1985) (holding plaintiff had liberty interest in her foster family relationship rooted in the Fourteenth Amendment's broad protection of "liberty" because "the foster parent-foster child relationship ha[d] precisely the same form and content as a healthy biological parent child relationship"); *Berhow v. Crow*, 423 So.2d 371, 372-73 (Fla. Dist. Ct. App. 1982) (where a foster child lived with her foster parents most of her life, the foster parents had a fundamental liberty interest in preserving their familial relationship based on the Due Process Clause).

Other states, in response to the changing dynamics of American families, have found that *de facto* parents should be afforded rights akin to those of natural parents, even if they are not prospective adoptive parents or foster parents. For example, the Supreme Court of Washington explained in 2005 that *de facto* parents have the same rights and responsibilities that attach to legal parents, holding that "henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological,

adoptive, or otherwise." *In re Parentage of L.B.*, 155 Wash. 2d 679, 707-708, 122 P.3d 161 (2005) (providing a detailed listing of other states that have come to the same conclusion, including: Massachusetts, Maine, Pennsylvania, New Jersey, Rhode Island, Indiana, Colorado, and New Mexico).

These rulings, by courts of multiple states, addressing the changing dynamics of American families, call for a renewed and thoughtful consideration of the constitutional and common law rights upon which these families depend. This Court should grant this petition and determine whether prospective adoptive families have a liberty interest in and a fundamental right to the sanctity of their family giving rise to substantive and/or procedural due process protection. If Petitioners, as prospective adoptive parents, who believed their family was permanent, and who raised Grayson for the first three years of his life as their child, are entitled to due process protection, then the Ohio Supreme Court erred as a matter of law when it affirmed the dismissal of Petitioners' adoption proceedings without a consideration of these rights and without notice or a hearing. Petitioners urge this Court to allow them to make this argument on the merits and have their rights, along with the rights of all other adoptive parents similarly situated, determined by this Court.

II. IT IS A QUESTION OF NATIONAL SIGNIFICANCE WHETHER CHILDREN IN CUSTODY AND ADOPTION PROCEEDINGS HAVE A FUNDAMENTAL RIGHT AND LIBERTY INTEREST IN THEIR FAMILY

GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

As outlined in Section I, *supra*, the Court has repeatedly recognized that under the Due Process Clause of the Fourteenth Amendment, parents have a liberty interest in, and fundamental right to, make decisions concerning the care, custody, and control of their children. Despite this repeated recognition, the Court has to date declined to "decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." *Michael H.*, 491 U.S. at 130. This case presents the Court with the opportunity to squarely address this issue.

In writing for the majority in *Lehr v. Robertson*, Justice Stevens recognized "the paramount interest in the welfare of children." 463 at U.S. 257. In his dissent to *Troxel v. Granville*, Justice Stevens went on to explore the fundamental right of children in the sanctity of their family unit. Justice Stevens wrote, "it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so too, do children have these interests, and so, too, must their interests be balanced in the equation." 530 U.S. at 88. In other words, children should be afforded similar protection of their fundamental constitutional rights as their parents and should not be treated as mere chattels.

In concert with this theory, this Court on numerous prior occasions has acknowledged that children are in many circumstances possessed of constitutional rights and liberties. *See Planned Parenthood of Central Mo.*

v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); *see also Troxel*, 530 U.S. at 89, n. 8; *Parham v. J. R.*, 442 U.S. 584, 600 (1979); *Goss v. Lopez*, 419 U.S. 565, 576 (1975); *In re Gault*, 387 U.S. 1, 13 (1967). That children can possess significant constitutional rights, yet have no right or voice in the determination of their family unit, a fundamental right for parents "deeply rooted in this Nation's history and tradition," seems incongruous at best. *Glucksberg*, 521 U.S. 702, 720-721 (1997).

Recognizing this incongruity, California state courts have held that children, not just parents, have constitutional rights in the sanctity of their family. As one court explained, "children are not merely chattels belonging to their parents, but rather have fundamental interests of their own" which are "of a constitutional dimension." *In re Bridget R.*, 41 Cal. App. 4th 1483, 1504, 1516 (1996), *cert. denied*, 117 S.Ct. 693 (1997), and *cert. denied*, 117 S.Ct. 1460 (1997), *superseded by statute on another ground as stated in In re Santos Y.*, 92 Cal. App. 4th 1274, 1311-1312, 112 Cal. Rptr. 2d 692 (2001). In making this determination, the court noted that the adopted twins at issue had "a *presently existing* fundamental and *constitutionally protected* interest in their relationship with the only family they have ever known." *Id.* at 1507 (emphasis in original).

Both Justice Stevens and the courts of California are correct: children possess the same constitutional rights in the preservation of their family as do their

parents. The historic respect and sanctity "traditionally accorded to the relationships that develop within the unitary family" must include the rights of the children of that family. *Michael H.*, 491 U.S. at 123. If Grayson is entitled to due process protection in the determination of his family unit, then the Ohio Supreme Court erred as a matter of law when it affirmed the dismissal of Petitioners' adoption proceedings without a consideration of his rights and without notice or a hearing. Had a court at any level of the state proceedings considered Grayson's fundamental right and liberty interest, they would have concluded Grayson should remain with Petitioners. In evaluating Grayson's best interests, the guardian ad litem appointed by the probate court explained that "Grayson will suffer negative effects if he is moved from his current home where he has attached." Dr. Kathleen Kirby, a licensed psychologist who evaluated Grayson, offered her report to the guardian ad litem where she stated: "In the case of Grayson Thomas Vaughn, the likelihood of irreparable harm is more than likely; it is inevitable." In addition, the Floyd County Circuit Court of Indiana found "Grayson and the Vaughns may be irreparably harmed if this court does not grant the petition for emergency custody order." Ignoring all of these conclusions, failing to consider Grayson's best interest, and terminating the adoption petition of his consented to and lawful adoption violated his constitutional rights. Petitioners urge this Court to allow them to make this argument on the merits and have the rights of their prospective adoptive child, and the rights of all other children similarly situated, determined by this Court.[3]

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[3] Under the rules governing third party standing, a litigant may assert the rights of another party if: (1) the litigant has suffered

III. IT IS A QUESTION OF NATIONAL SIGNIFICANCE WHETHER THE OHIO SUPREME COURT MISAPPLIED U.S. SUPREME COURT PRECEDENT TO BESTOW CONSTITUTIONAL RIGHTS ON A PUTATIVE FATHER BASED SOLELY ON THE RESULTS OF DNA TESTING.

"'Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.'" *Lehr*, 463 U.S. at 260 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stevens, J., dissenting)). Based on this principle, this Court has held that a biological father who possesses "the mere existence of a biological link does not merit equivalent constitutional protection" as a father who 'demonstrates a full commitment to the responsibilities of parenthood "by com[ing] forward to

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an injury in fact; (2) the litigant has a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect his own interests. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Petitioners satisfy all of these requirements: (1) they have suffered an injury in fact due to the dismissal of their petition for adoption; (2) Grayson is their prospective adoptive child who lived with Petitioners for the first three years of his life; and (3) as a minor, Grayson is unable to assert his own rights in this Court. While Grayson was appointed a guardian ad litem for a portion of the adoption proceedings by the probate court, the guardian ad litem has filed a motion to withdraw and is pursuing no legal action concerning Grayson's rights.. *See also, OFFER*, 431 U.S. at 841, n. 44 (noting that "we believe it would be most imprudent to leave entirely to court-appointed counsel the choices that neither the named foster children nor the class they represent are capable of making for themselves, especially in litigation in which all parties have sufficient attributes of guardianship that their views on the rights of the children should at least be heard").

participate in the rearing of his child.'" *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 392). The Court went on to explain:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Lehr, 463 U.S. at 262. In other words, establishing that a man is the biological father of a child and nothing more does not give him the constitutional right to custody of that child.

In making the determination that biology alone does not determine constitutional rights concerning the family, this Court upheld the constitutionality of a putative father registry created by the State of New York. *Lehr*, 463 U.S. 248. The New York Legislature created the putative father registry to "accommodate both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures." *Id.* at 263. In accordance with this statutory scheme, the biological father in *Lehr* was not entitled to notice of the adoption of his child, despite filing a visitation and paternity petition in state court prior to the finalization of his biological child's adoption, because he failed to follow the

requirements of the putative father registry. This Court found the registry constitutional and found that the biological father's constitutional rights were not violated by his failure to receive notice of the adoption proceeding. In making this determination, the Court explained "we are *not* assessing the constitutional adequacy of New York's procedures for *terminating a developed relationship*. Appellant has never had any significant custodial, personal, or financial relationship with" his child. *Lehr*, 463 U.S. at 262 (emphasis added). Instead, the Court was "concerned *only* with whether New York has adequately protected his *opportunity to form such a relationship*." *Id.* at 262-263 (emphasis added).

Unmarried fathers who fail to grasp an opportunity to develop a relationship with their biological child are not entitled to the same constitutional protections as parents who are actively involved in the rearing of their children. In accordance with the constitutionality of the putative father registry in *Lehr*, and in response to the changing dynamic of parenthood in the United States, states across the country have enacted putative father registries to "accommodate both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures." *Id.* at 263. The Ohio Supreme Court's decision in this case has called into the question the validity and enforcement of these registries. With 41 percent of all children today being born to unmarried mothers, the issue of what rights the fathers of these children have is of paramount importance. National Vital Statistics Reports 59, U.S. Department of Health and Human Services, BIRTHS: PRELIMINARY DATA FOR 2009, p. 5. This Court should take the opportunity presented here to affirm the constitutionality of

putative father registries and the legislatively enacted procedures in place nationwide to efficiently determine the rights of unwed fathers and their biological children.

A. The Ohio Supreme Court Misapplied Prior U.S. Supreme Court Jurisprudence in Erroneously Bestowing Constitutional Rights on Respondent.

Despite the repeated holdings by this Court limiting the constitutional rights of biological fathers to custody of their children with whom they have no relationship, the Ohio Supreme Court bestowed ultimate constitutional rights on the Respondent based on his DNA alone and effectively rendered the Ohio putative father registry meaningless. In making this determination, the Ohio Supreme Court cited and relied upon two cases of this Court concerning the termination of parental rights – one involving termination in the face of extreme abuse and neglect, and one involving the rights of indigent parents to appeal a termination decision. *Adoption of G.V.*, 126 Ohio St.3d at 250-251 (citing *Santosky*, 455 U.S. at 753; and *M.L.B.*, 519 U.S. 102). The reliance on these parental termination cases, when this Court's case law concerning putative fathers like the Respondent is well established, was in error.

First, the Ohio Supreme Court quoted the dissent of Justice Brennan in *Cruzan v. Director, Mo. Dept. of Health*, for the declaration that this court's decision in *Santosky*

> requir[es] a clear and convincing evidence standard for termination of parental rights

> because the parent's interest is fundamental but the State has no legitimate interest in the termination unless the parent is unfit, and finding that the State's interest in finding the best home for the child does not arise until the parent has been found unfit.

497 U.S. at 319 (Brennan, J., dissenting). In citing *Santosky* for the proposition that in permanent neglect termination proceedings, parental rights can only be terminated based on clear and convincing evidence, Justice Brennan was only responding to the majority's contention in *Cruzan* that where "important individual rights are at stake, a clear and convincing evidence standard has long been held to be an appropriate means of enhancing accuracy" 497 U.S. at 319 (Brennan, J., dissenting). In other words, Justice Brennan cited *Santosky* to show that traditionally, in imposing a clear and convincing standard as a constitutional minimum, the Court has done so only in narrow situations. Justice Brennan argued that as a result, states should be prohibited from "impos[ing] a clear and convincing evidence standard as an obstacle to the exercise of a fundamental right," such as the right to end life-prolonging treatment. *Id.* That the State should be prohibited from imposing an evidentiary standard as a barrier to effectuating the wishes of an individual to terminate his or her life support has no bearing on whether the Respondent in this situation should be retroactively afforded status of a legal father, with all rights associated therein. The Ohio Court's reliance on Justice Brennan's analysis of *Santosky* was in error.

Next, the Ohio Supreme Court cited the dissent of Justice Rehnquist in *Santosky*, declaring that "[f]ew

consequences of judicial action are so grave as the severance of natural family ties." *Santosky*, 455 U.S. at 787 (Rehnquist, J., dissenting). While Justice Rehnquist did indeed make this statement, and also stressed the right of a parent in the companionship, care, custody, and management of his children, Justice Rehnquist did so in an effort to explain why the law of New York – requiring the State to meet only a preponderance of the evidence standard before terminating a parent's parental rights in a neglect proceeding -- was constitutional. In making this determination, Justice Rehnquist noted: 'A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. . . . In addition to the child's interest in a normal homelife, "the State has an urgent interest in the welfare of the child.'" *Santosky*, 455 U.S. at 788-790 (Rehnquist, J., dissenting). Based on these interests, Justice Rehnquist would have upheld the standard of review provided by New York which was specifically used to "provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, *furthering the best interests, needs, and rights of the child by terminating the parental rights and freeing the child for adoption*." *Id.* at 791 (emphasis added).

Finally, the Ohio Supreme Court quoted *M.L.B.*, noting: 'With "a family association so undeniably important . . . at stake," we approach the case before us "mindful of the gravity" of the circumstances and the long-term impact on all the concerned parties.' *Adoption of G.V.*, 126 Ohio St.3d at 250-251. In quoting these select passages, the Ohio Supreme Court neglected to note that *M.L.B.* specifically applied only

to a termination proceeding in which a parent, who was indigent and desired to appeal the termination of her parental rights, was prohibited by state law from doing so because she could not pay the fee for transmittal of the record to the court. 519 U.S. at 107-109. With these specific facts in mind, this Court explained: "M.L.B.'s case, involving the State's authority to sever permanently *a parent-child bond*, demands the close consideration the Court has long required when a family association so undeniably important is at stake. We approach M.L.B.'s petition mindful of the gravity of the sanction imposed on her . . . ." 519 U.S. at 116-117 (emphasis added).

At no point in either of the termination cases relied upon by the Ohio Supreme Court, did this Court address the rights of a man who is determined, seventeen months after the placement of his biological child with a prospective adoptive family, to be the child's biological father. Despite this striking lack of relevancy, the Ohio Supreme Court relied on Stevens' dissent in *Cruzan* discussing *Santosky*, Rehnquist's dissent in *Santosky*, and *M.L.B.* to place Respondent's alleged parental rights ahead of those of the Petitioners and Grayson himself. By granting this petition, the Court can clarify whether its cases concerning the termination of parental rights when a developed parental relationship is established have any bearing on the constitutional rights of putative fathers like the Respondent.

B. Ohio's Ruling Calls the Validity of Putative Father Registries into Serious Question.

The Ohio General Assembly created the putative father registry in 1996 to streamline the adoption

process. *Adoption of G.V.*, 126 Ohio St.3d at 258 (Cupp, J., dissenting). Among the Legislature's primary objectives, was "to prevent children from being forcibly removed from their adoptive homes after a biological father belatedly exercised parental rights." *Id.* (citing 64 Ohio Report No. 198, Gongwer News Service, Inc (October 17, 1995) 1). To further this objective, the Ohio General Assembly enacted the statutes at issue here "requiring putative fathers to promptly demonstrate their commitment to meeting the responsibilities of parenthood." *Id.* (citing Ohio Rev. Code Ann. § 3107.061, 3107.06, 3107.07(B)(1); and *In re Adoption of Zschach*, 75 Ohio St.3d 648, 651-52, 665 N.E.2d 1070 (1996)).

According to the relevant Ohio statutes, a putative father is defined as a man who "has not been determined, *prior to the date a petition to adopt the child is filed*, to have a parent and child relationship with the child." Ohio Rev. Code Ann. § 3107.01. If a man is determined to be a putative father based on his status at the time the adoption petition is filed, his consent to the adoption is not required if, either: (1) he has "willfully abandoned or failed to care for and support the minor;" or (2) has "willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first . . . ." Ohio Rev. Code Ann. § 31707.07(B)(2).

Based on the literal reading of these statutes, Respondent is a putative father whose consent to Grayson's adoption was not required. As noted by the three separate dissents in this case, although Respondent had filed a paternity action in juvenile

court prior to the Petitioners' filing of their adoption petition, nothing in the adoption statutes provide for a stay of the adoption proceedings to allow for the filing of or completion of pending actions to establish paternity. *See, e.g., Adoption of G.V.*, 126 Ohio St.3d at 250 (Brown, J., dissenting). Instead, the statutes and the intent of the Ohio General Assembly is absolutely clear: a child may be adopted without a putative father's consent even if he timely registers if he fails to establish a parent-child relationship before the adoption petition is filed. *Id.*

Despite this clear legislative intent and statutory language, the Ohio Supreme Court ruled that a putative father can change his status to legal father months after an adoption petition has been filed based solely on the results of a DNA test, in clear contravention of the express language of the relevant statute. *Adoption of G.V.*, 126 Ohio St.3d at 251. The Ohio Supreme Court eliminated the requirement established by the Ohio General Assembly in creating a putative father registry that any determination that a man is the legal father for purposes of an adoption proceeding be made prior to the time the adoption petition is filed with the probate court. By writing this key requirement out of the statute, the Ohio Supreme Court has undermined the effectiveness of the putative father registry and has upended Ohio's orderly adoption process. 126 Ohio St.3d at 257 (Cupp, J., dissenting). If the Ohio courts can effectively eliminate the requirement of a putative father registry if a DNA test, performed to obtain a social and medical history, demonstrates a biological connection, then putative father registries all over the country are subject to the same attack. Worse, thousands of adopted children are vulnerable to that which the Ohio

General Assembly, and many other State legislatures have worked to prevent: "being forcibly removed from their adoptive homes after a biological father belatedly exercised parental rights." 126 Ohio St.3d at 258 (Cupp, J., dissenting) (citing 64 Ohio Report No. 198, Gongwer News Service, Inc (October 17, 1995) 1). By granting this Petition, the Court can lay to rest concerns about the constitutionality of putative father registries and can affirm its holding in *Lehr* that biology alone does not bestow a man with full constitutional rights in the custody, care, and control of his child equivalent to that of an active parent.

C. Ohio's Ruling Directly Conflicts With Decisions of Other States.

When faced with similar challenges to the putative father registries and similar laws of other states, other state courts have not only found them constitutional, but have affirmed adoptions over the objections of the biological father when the biological father has either "willfully abandoned or failed to care for and support the minor;" or has "willfully abandoned the mother of the minor during her pregnancy and up to the time of . . . the minor's placement in the home of the petitioner." Ohio Rev. Code Ann. § 31707.07(B)(2).

In *Michael H. v. Mark K.*, the Supreme Court of California held that a biological father had no constitutional right to veto the adoption of his biological child "unless he shows that he promptly came forward and demonstrated a full commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned or reasonably should have learned that the biological mother was pregnant with

his child." 10 Cal. 4th 1043, 1060, 898 P.2d 891 (1995). The facts of the *Mark K.* case are strikingly similar to those presented here: the biological father learned the biological mother was pregnant with his child, yet he failed to fully commit to the responsibilities of parenthood and discussed giving the child up for adoption. *Mark K.*, 10 Cal. 4th at 1060. The child was placed with the prospective adoptive parents at birth and remained there through the entirety of the litigation in state court – until the child was over four years old. *Id.* at 1053. At no point prior to the child being placed with the prospective adoptive parents did the biological father assume an active parental role in his child's life or take an involvement in prenatal care. It was not until two weeks after the child was born that he sought any involvement in his child's life – launching an aggressive campaign in the courts, in local media, and in every avenue possible to secure custody of his child. *Id.* at 1053-1054, 1060. Despite the biological father's change of heart, the court held that his failure to promptly assume parental responsibilities during pregnancy foreclosed his ability to withhold his consent to the adoption. As the court noted, "[i]t would seem inequitable to give preference to an unwed father who failed to fully grasp his parental obligations in a timely fashion over prospective adoptive parents who have made a significant and continuing effort, both before and after birth, to discharge the responsibilities of parenthood." *Mark K.*, 10 Cal. 4th at 1058.

Similarly, in a case involving an interstate adoption where the birth mother purposefully withheld information concerning the biological father and violated the terms of the ICPC in placing the child with the prospective adoptive family, the Court of

Appeals of Maryland nevertheless held that the biological father had no right to object to the adoption of his child. *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 701 A.2d 110 (1997). As the court noted,

> [The respondent] . . . in our judgment is emotionally immature and has no real concept as to the responsibilities of parenting a child. He is caught up with the concept that it reflects upon his manhood if he does not parent the child . . . . He was more interested in pursuing the legal gamesmanship than he was in making actual contact with the child.

347 Md. at 327-328. The court agreed with the trial court when it concluded that despite the biological father's use of the court system to delay and attempt to stop the adoption, he abandoned his rights to make demands concerning custody of the child when he failed to step forward to help care for the child's needs on a prenatal basis as well as after she was born. *Id.* at 330.

Other courts faced with similar situations have reached the same conclusion. *See, e.g., Matter of Adoption of Doe*, 543 So.2d 741 (Fla. 1989); *Matter of Adoption of Baby Boy S.*, 822 P.2d 76, 78, 16 Kan. App. 2d 311, 313-314 (1991); *Matter of Kailee C.C.*, 179 A.D.2d 891, 892-893, 579 N.Y.S.2d 191, 192-193 (1992); *Matter of Adoption of Baby Boy W.*, 831 P.2d 643, 646 (Okla. 1992); *see also Escobedo v. Nickita*, 365 Ark. 548, 557-558, 231 S.W.3d 601, 608 (2006).

When faced with strikingly similar cases to the one presented here, courts of other states have repeatedly strictly construed the terms of their statutes and

affirmed the validity of adoptions over the objection of biological fathers who were putative fathers at the time the adoption petitions were filed. The Ohio Supreme Court should have done the same. In deciding, however, that the results of a DNA test confirming Respondent's status as a biological father seventeen months after the adoptive placement was made changes his status from that of putative father to legal father, and bestows upon him all the constitutional protections of an active parent, the Court effectively rendered the putative father registry meaningless, and eliminated all support requirements of a putative father to support his child and the biological mother during her pregnancy. This holding is in direct conflict with the decisions of other states highlighted above. By granting this petition, the Court has an opportunity to address this conflict and clarify the constitutionality of putative father registries that fix the determination of a father's status at the time an adoption is filed.

CONCLUSION

This petition presents the Court with a unique opportunity to address several issues of constitutional importance to millions of families and children nationwide. The ability of an absent biological father to obtain full constitutional rights concerning his biological child, seventeen months after his child is placed with a prospective adoptive family, in clear contravention of relevant state statutes and the constitutional rights of other parties involved, will not only bring fear into the hearts of adoptive parents nationwide, but will have the effect of chilling private adoptions of unwanted children. This Court has the opportunity to answer long overdue questions

concerning the constitutional due process rights of prospective adoptive parents, their children, and biological fathers – questions that will have long-lasting and meaningful impact on families seeking adoptive children and mothers who desire to find lasting and loving adoptive homes for their babies. Granting this petition will not only allow Petitioners and three-year-old Grayson to finally have a voice in the legal system, it will allow the Court to address an issue that strikes at the very heart of this nation: the sanctity of the family. Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

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APPENDIX A

SUPREME COURT OF OHIO

No. 2009-2355

[Decided July 22, 2010]

IN RE ADOPTION OF G.V.

[Cite as *In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349.]

When an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child — The determination of a parent-child relationship in the juvenile court proceeding must be given effect in the stayed adoption proceeding.

(No. 2009-2355 — Submitted May 25, 2010 — Decided July 22, 2010.)

APPEAL from the Court of Appeals for Lucas County, No. L-09-1160, 2009-Ohio-6338.

PFEIFER, J.

{¶ 1} In *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, this court

stated, "The issue presented for our review is whether a probate court must refrain from proceeding with the adoption of a child when an issue concerning the parenting of that child is pending in the juvenile court. We hold that, in such circumstances, the probate court must defer to the juvenile court and refrain from addressing the matter until adjudication in the juvenile court." Id. at ¶ 8. We consider our holding in *Pushcar* to be dispositive of the issue before us and affirm the judgment of the court of appeals.

Facts and Procedural History

{¶ 2} G.V. was born on October 29, 2007. His birth mother and legal father each executed a permanent-surrender agreement pursuant to R.C. 5103.15 in early November 2007. Appellee, Benjamin Wyrembek, timely registered with the Putative Father Registry, and he filed an action to establish parental rights in juvenile court in Fulton County on December 28, 2007. Appellants, Jason and Christy Vaughn, filed a petition for adoption in probate court in Lucas County on January 16, 2008.

{¶ 3} The probate court stayed its adoption proceedings pending determination of paternity by the juvenile court in Lucas County, to which Wyrembek's action had been transferred. After all relevant parties had submitted to genetic testing, the juvenile court determined, by judgment entry dated March 17, 2009, that Wyrembek was the father of G.V., and it dismissed Wyrembek's action due to the pending adoption proceedings.

{¶ 4} The probate court concluded that R.C. 3107.07(A) governed the adoption proceeding before it.

Pursuant to that statute, an adoption can proceed without the consent of a parent who has failed without justifiable cause to communicate with or provide support for the child for a period of at least one year immediately preceding either the filing of the petition for adoption or the placement of the minor with the person petitioning for adoption. The court concluded that the one-year period could not begin to run against Wyrembek until his paternity had been established and found that the Vaughns had filed the petition for adoption prematurely. On appeal, the court of appeals affirmed the decision of the probate court. We accepted the Vaughns' discretionary appeal.

Analysis

{¶ 5} "[T]he right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law." *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, 164, 23 OBR 330, 492 N.E.2d 140, citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599. *Santosky* has been characterized as "requiring a clear and convincing evidence standard for termination of parental rights because the parent's interest is fundamental but the State has no legitimate interest in termination unless the parent is unfit, and finding that the State's interest in finding the best home for the child does not arise until the parent has been found unfit." *Cruzan v. Director, Missouri Dept. of Health* (1990), 497 U.S. 261, 319, 110 S.Ct. 2841, 111 L.Ed.2d 224 (Brennan, J., dissenting).

{¶ 6} "Few consequences of judicial action are so grave as the severance of natural family ties." *Santosky*, 455 U.S. at 787, 102 S.Ct. 1388, 71 L.Ed.2d

599 (Rehnquist, J., dissenting). Because adoption terminates fundamental rights of the natural parents, "we have held that '* * * [a]ny exception to the requirement of parental consent [to adoption] must be strictly construed so as to protect the right of natural parents to raise and nurture their children.' " *In re Adoption of Masa*, 23 Ohio St.3d at 165, 23 OBR 330, 492 N.E.2d 140, quoting *In re Schoeppner* (1976), 46 Ohio St.2d 21, 24, 75 O.O.2d 12, 345 N.E.2d 608. With "a family association so undeniably important * * * at stake, "we approach the case before us "mindful of the gravity" of the circumstances and the long-term impact on all the concerned parties. *M.L.B. v. S.L.J.* (1996), 519 U.S. 102, 117, 117 S.Ct. 555, 136 L.Ed.2d 473. We turn now to our most recent pronouncement in this important and contentious area of the law.

In re Adoption of Pushcar

{¶ 7} In *Pushcar*, the child's mother married a man who was not the biological father of the child, and that man attempted to adopt the child. 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647. The natural father, who had not yet been determined to be the father, opposed the adoption, and the issue was whether his consent was necessary. We concluded that that father could not be shown to have failed to communicate with or failed to support his child for one year pursuant to R.C. 3107.07(A) until one year had elapsed from the time his paternity was established. Id. at ¶ 14. An integral part of our analysis was our holding that the probate court could not proceed with the adoption while "an issue concerning the parenting of that child is pending in the juvenile court." Id. at ¶ 8.

{¶ 8} Although the case involved a relatively narrow issue, our holding was more general, as memorialized in the syllabus: "When an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child." It is clear that we did not intend our holding or analysis to be restricted to parenting issues implicated by R.C. 3107.07(A). Rather, our use of general language shows that we intended the holding to apply to all parenting issues pending in a juvenile court.

Application of Pushcar

{¶ 9} As in *In re Adoption of P.A.C.*, 126 Ohio St.3d 236, 2010-Ohio-3351, ___N.E.2d ___, the natural father in this case, Benjamin Wyrembek, attempted to establish paternity prior to the filing of an adoption petition. Wyrembek filed with the Putative Father Registry, something the natural father did not do in *P.A.C.* The probate court in this case stated, "[W]hen a parentage action is pending prior to the filing of the adoption petition, [it] must apply *Pushcar* [110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647]. It must be logically assumed that the Supreme Court of Ohio intended the probate court to consider the findings of the juvenile court made while the adoption proceeding is being held in abeyance. In this case, the juvenile court has ruled that Mr. Wyrembek is the father of the child who is the subject of this adoption proceeding, therefore [this] Court hereby rules that for purposes of determining the necessity of Mr. Wyrembek's consent, he is to be deemed a legal father." Based on the facts before it and its understanding of *Pushcar*, the probate court dismissed the adoption petition. We conclude that the probate court properly applied *Pushcar* and

that the court of appeals properly affirmed the decision of the probate court.

Conclusion

{¶ 10} Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

LUNDBERG STRATTON, O'CONNOR, AND O'DONNELL, JJ., concur.

BROWN, C.J., AND LANZINGER AND CUPP, JJ., dissent.

BROWN, C.J., dissenting.

{¶ 11} Before a child can be adopted, R.C. 3107.06 requires that certain persons and entities consent to the adoption. These persons include the mother of the child, the father of the child, and, if applicable, the putative father of the child. R.C. 3107.06. R.C. 3107.01(H) defines "putative father"[1] and R.C.

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[1] {¶ a} A "putative father" is defined as a man who may be a child's father and to whom all of the following apply:

{¶ b} "(1) He is not married to the child's mother at the time of the child's conception or birth;

{¶ c} "(2) He has not adopted the child;

{¶ d} "(3) He has not been determined, *prior to the date a petition to adopt the child is filed*, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code [parentage statutes], a court proceeding in another state, an administrative

3107.06(B) defines "father"[2] for the purposes of the adoption statutes.

{¶ 12} Although consent is generally required from the persons enumerated in R.C. 3107.06, R.C. 3107.07 sets forth exceptions to the consent requirements. R.C. 3107.07(A) allows a court to find parental consent unnecessary when the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor for a period of at least one year immediately preceding the filing of

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agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code [administrative-determination-of-paternity statutes], or an administrative agency proceeding in another state;

{¶ e} "(4) He has not acknowledged paternity of the child pursuant to sections 3111.21 to 3111.35 of the Revised Code." (Emphasis added.) R.C. 3107.01(H).

[2] {¶ a} A "father" is a man to whom any of the following apply:

{¶ b} "(1) The minor was conceived or born while the father was married to the mother;

{¶ c} "(2) The minor is his child by adoption;

{¶ d} "(3) *Prior to the date the petition was filed*, it was determined by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code [parentage statutes], a court proceeding in another state, an administrative proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code [administrative-determination-of-paternity statutes], or an administrative proceeding in another state that he has a parent and child relationship with the minor;

{¶ e} "(4) He acknowledged paternity of the child and that acknowledgment has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code." (Emphasis added.) R.C. 3107.06(B).

the adoption petition or the placement of the minor in the home of the petitioner.

{¶ 13} Under R.C. 3107.07(B)(1), a putative father's consent is unnecessary when he fails to register as the minor's putative father with the Putative Father Registry not later than 30 days after the minor's birth. R.C. 3107.07(B)(2) states that a putative father's consent is not required when the court finds, after proper service of notice and hearing, that the putative father (1) is not the father of the minor, (2) has willfully abandoned or failed to care for and support the minor, or (3) has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor or the minor's placement in the home of the petitioner, whichever occurs first.

{¶ 14} In the case before us, the primary issue is whether appellee Benjamin Wyrembek's consent to the adoption is required. It is undisputed that Wyrembek timely registered with the Putative Father Registry. Accordingly, R.C. 3107.07(B)(2) should be applied to Wyrembek to determine whether his consent to the adoption is necessary.

{¶ 15} In order to require the probate court to use the more exacting standards of R.C. 3107.07(A) in determining whether his consent is necessary, rather than the less stringent standards of R.C. 3107.07(B)(2), Wyrembek seeks to change his status in the adoption proceeding from putative father to father based on a finding made after the adoption petition was filed. Wyrembek contends that if a judicial proceeding to establish paternity has been filed in juvenile court prior to the filing of an adoption petition in probate court, the adoption proceeding must be

stayed until the paternity proceedings are completed. Wyrembek further contends that the juvenile court's paternity determination must be used by the probate court to determine the status and rights of the respective parties in the adoption proceeding.

{¶ 16} The majority agrees with Wyrembek and holds that the adoption proceedings must be stayed pending completion of the juvenile court paternity proceedings, that the juvenile court's finding of paternity must be recognized by the probate court, and that Wyrembek's new status as "father" rather than "putative father" requires that the probate court apply the consent-to-adoption exception contained in R.C. 3107.07(A). In so holding, the majority fails to apply the unambiguous language of the relevant adoption statutes, erroneously relies on *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, and contravenes the express adoption policy established by the General Assembly.

Statutory language

{¶ 17} The majority's opinion ignores the unambiguous statutory language that requires that participants' status be determined at the time an adoption petition is filed.

{¶ 18} The definition of "putative father" specifically provides that a man is a putative father if "[h]e has not been determined, *prior to the date a petition to adopt the child is filed*, to have a parent and child relationship" with the child through a court or administrative proceeding. (Emphasis added.) R.C. 3107.01(H). Similarly, the definition of "father" under R.C. 3107.06(B)(3) provides that to establish a parent-

child relationship through court or administrative proceedings, the court or administrative determination must be completed "[p]rior to the date the [adoption] petition was filed." In other words, when an adoption petition is filed, the statutes require the status of the parties involved to be ascertained *at that time*.

{¶ 19} The statutes are absolutely clear that the child may be adopted without a putative father's consent when he fails to register with the Putative Father Registry or to establish a parent-child relationship through one of the judicial or administrative means set forth in R.C. 3107.06(B) before the adoption petition is filed. The statutes also are absolutely clear that consent is required from a putative father who timely registers with the Putative Father Registry unless the exception set forth in R.C. 3107.07(B)(2) applies. Nothing in the adoption statutes provides for a stay of the adoption proceedings to allow for the filing of or completion of pending actions to establish paternity.

Pushcar

{¶ 20} The majority relies upon this court's previous decision in *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, to support its holding in this case. But the majority's reliance on *Pushcar* is misplaced.

{¶ 21} *Pushcar* addressed the need for a stay of adoption proceedings when the party petitioning for adoption relies on R.C. 3107.07(A) to divest a father of his parental rights. This court held that in order for the R.C. 3107.07(A) exception to consent to apply, the petitioner must prove paternity, and a stay of the

adoption proceeding was necessary to allow for the juvenile court to complete the proceedings to establish paternity. The adoption petition in this case did not allege that Wyrembek's consent was not required under R.C. 3107.07(A), but instead asserted that Wyrembek's consent was unnecessary based upon R.C. 3107.07(B). Therefore, there is no need to establish paternity for the purposes of R.C. 3107.07(A) and the reasoning of *Pushcar* is inapplicable to the facts currently before the court.

{¶ 22} More importantly, *Pushcar* failed to address the relevant statutory language of the adoption statutes regarding the time at which a participant's status is determined and was based in large part upon this court's decision in *In re Adoption of Sunderhaus* (1992), 63 Ohio St.3d 127, 585 N.E.2d 418, which was decided prior to the creation of the Putative Father Registry and the enactment of the accompanying amendments to the adoption statutes. Am.Sub.H.B. No. 419, 146 Ohio Laws, Part III, 4660. In *Sunderhaus*, this court found that the ability of a court to dispense with the consent requirement under R.C. 3107.07(A) is dependent upon the establishment of a parent-child relationship and that establishing the parent-child relationship requires a judicial ascertainment of paternity. Id. at 130.

{¶ 23} This analysis is consistent with the statutory scheme in place at the time.[3] At the time

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[3] At the time, R.C. 3107.06 provided that a father's consent to adoption was required "if the minor was conceived or born while the father was married to the mother, if the minor is his child by adoption, or if the minor has been established to be his child by a

Sunderhaus was decided by this court, the only statutorily available method for an unwed biological father to establish a parent-child relationship was through a judicial proceeding. By relying on *Sunderhaus*, *Pushcar* failed to recognize that new, alternative statutory methods existed for an unwed biological father to establish a parent-child relationship in addition to a judicial determination.

{¶ 24} The *Pushcar* majority's reliance on *Sunderhaus* is further called into question given the unclear nature of the facts of *Pushcar*. *Pushcar*'s facts suggest that the natural father already had an established parent-child relationship prior to the filing of the juvenile court proceedings. *Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647 at ¶1, 4. It is also unclear in *Pushcar* whether the juvenile court proceeding was initiated to establish a parent-child relationship judicially or to enforce the natural father's visitation rights based upon his established parent-child relationship. Id.

{¶ 25} Because the analysis of *Pushcar* fails to address the relevant statutory provisions, relies upon *Sunderhaus*, and is based on factual circumstances that are unclear from the opinion, I find that *Pushcar*'s holding is of limited value and should not be extended beyond the R.C. 3107.07(A) context.

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court proceeding." Am.Sub.H.B. No. 790, 142 Ohio Laws, Part III, 5323, 5333.

The General Assembly's adoption policy

{¶ 26} The majority's holding is also contrary to the public policy clearly expressed in the current adoption statutes. Justice Cupp's dissent correctly sets forth the legislative history and objectives of the 1996 amendments to Ohio's adoption statutes.

{¶ 27} The express legislative direction contained within the adoption statutes requires determination of the status of the participants at the time the adoption petition is filed. This advances the goals of the 1996 amendments to the adoption statutes by avoiding the delays inherent in allowing ancillary litigation regarding status to complete before considering the adoption petition. While the majority may disagree with the statutory scheme and its potentially harsh result in these circumstances, it is not this court's place to disregard clear statutory language to come to a result that the majority finds more equitable in this case. This court should respect the policy decisions made by the General Assembly in enacting the amended adoption statutes and apply the statutory language as written.

Conclusion

{¶ 28} Wyrembek timely registered with the Putative Father Registry, but failed to establish a parent-child relationship before the adoption petition was filed. Therefore, Wyrembek is a putative father for the purposes of the adoption proceedings. The probate court should have conducted a hearing to determine whether Wyrembek's consent was necessary in accordance with R.C. 3107.07(B)(2). Staying the probate court's adoption proceedings for a juvenile

court proceeding to establish paternity is inappropriate in light of the clear directive of the adoption statutes and unnecessarily delays adoption proceedings contrary to the intent of the General Assembly.

{¶ 29} For the foregoing reasons, I would reverse the judgment of the Sixth District Court of Appeals and remand the cause for further consideration.

LANZINGER, J., dissenting.

{¶ 30} I respectfully dissent based on my dissent in *In re Adoption of P.A.C.*, 126 Ohio St.3d 236, 2010-Ohio-3351, ___ N.E.2d ___.

{¶ 31} Although Wyrembek filed a parentage action to determine whether he had a parent-child relationship with G.V., that action had not concluded when the adoption petition was filed. Therefore, under the plain language of R.C. 3107.01(H), Wyrembek remains within the definition of "putative father," and R.C. 3107.07(A) does not apply. Because Wyrembek had timely registered as a putative father, the trial court should have held a hearing to determine whether his consent is not required under R.C. 3107.07(B)(2).

{¶ 32} For the foregoing reasons, I would reverse the judgment of the Sixth District Court of Appeals and remand the case to the probate court for further proceedings.

CUPP, J., dissenting.

{¶ 33} Our role with regard to statutory interpretation is to apply clear and unambiguous statutes as written and to engage in no further interpretation. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. It is our duty to enforce a statute as written and to not add or subtract language from the statute. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 366, 18 OBR 419, 481 N.E.2d 613. And I agree with Chief Justice Brown's analysis regarding the plain and unambiguous requirements of the statutes applicable to this matter.

{¶ 34} In this case, appellant registered on the Putative Father Registry. However, appellant failed to have determined by a court or administrative proceeding *prior to the date the adoption petition was filed* that he had a parent-child relationship with the child. R.C. 3107.06(B), 3107.01(H), and 3107.07(B)(1). The adoption statutes require that the statuses of the parties in an adoption proceeding involved be ascertained *at the time the adoption petition is filed.* Consequently, R.C. 3107.07(A), which sets out when a *parent's* consent to adoption is not required, is not applicable here, because appellant's status at the time the adoption petition was filed was as a putative father. This result may seem harsh. Nevertheless, appellant is a "putative father," as that term is defined in R.C. 3107.01(H), and his consent is necessary, R.C. 3107.06(C), unless one of the R.C. 3107.07(B)(2) exceptions applies to negate his right to consent.

{¶ 35} I also agree with Justice Lanzinger's conclusion that the holding in *In re Pushcar,* 110 Ohio

St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, should be applied herein. The *Pushcar* syllabus plainly states that "[w]hen an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child." Id. Clearly, the stay required by *Pushcar* applies to this case.

{¶ 36} The majority's application of *Pushcar* to this case, however, takes the *Pushcar* holding too far by permitting a party's consent-to-adoption status to change even *after the adoption petition has been filed, in clear contradiction of the language of the statute.* Expanding *Pushcar* in this way amounts essentially to judicially waiving the requirement that *any* determination that a man is the natural father – for purposes of the adoption proceeding – be made *prior to the time the adoption petition is filed* with the probate court. R.C. 3107.01(H). This extension of *Pushcar* is contrary to both the General Assembly's clear statutory directive and to the public policy that it has clearly expressed in the adoption statutes. That the biological-parent determination must be made before an adoption petition is filed in order to legally fix the necessity of obtaining that person's consent to the adoption is a mandatory statutory requirement (which the majority seems intent on judicially writing out of the statute). The majority's decision today serves only to undermine the effectiveness of the provisions pertaining to putative fathers and to upend Ohio's orderly adoption process.

{¶ 37} Ohio's adoption laws were amended in 1996 to streamline the adoption process. Am.Sub.H.B. No. 419, 146 Ohio Laws, Part III, 4660. This statutory enactment had among its primary objectives the

establishment of statewide standards for adopting a child and the reduction of the time necessary to finalize an adoption from what was often four years before the statutory change, to between nine and 24 months under the current framework. 64 Ohio Report No. 215, Gongwer News Service, Inc. (Nov. 9, 1995) 6. Another objective of the legislation was to prevent children from being forcibly removed from their adoptive families after a biological father belatedly exercised parental rights. 64 Ohio Report No. 198, Gongwer News Service, Inc. (Oct. 17, 1995) 1.

{¶ 38} To achieve these goals while also upholding the rights of the natural parents, the child, and the adoptive parents, the General Assembly created the Putative Father Registry and other options for putative fathers to maintain consent-to-adoption rights. Legislative Service Commission Final Bill Analysis, Am.Sub.H.B. No. 419, 121st General Assembly; 65 Ohio Report No. 56, Gongwer News Service, Inc. (Mar. 21, 1996) 6; *In re Adoption of Zschach* (1996), 75 Ohio St.3d 648, 651-652, 665 N.E.2d 1070. After holding open hearings, inviting input from the public and adoption advocates, and reviewing adoption policy, the General Assembly enacted statutes requiring putative fathers to promptly demonstrate their commitment to meeting the responsibilities of parenthood. R.C. 3107.061, 3107.062 and 3107.07(B)(1); *Zschach*, 75 Ohio St.3d at 651-652, 665 N.E.2d 1070. The United States Supreme Court has also sanctioned the use of putative-father registries as mechanisms to facilitate the adoption process. *Lehr v. Robertson* (1983), 463 U.S. 248, 263-264, 266-268, 103 S.Ct. 2985, 77 L.Ed.2d 614.

{¶ 39} As this court has previously observed, the "goal of the adoption statutes is to protect the best interests of children. In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home, and ensuring that the adoption process is completed in an expeditious manner." (Citation omitted.) *Zschach* at 651. The express legislative direction contained within the adoption statutes that requires the status of the biological father to be determined at the time the adoption petition is filed is one that the legislature has determined advances this goal.

{¶ 40} In contrast, the majority's application of *In re Pushcar* to the case now before us is in direct contravention of the clearly expressed requirements of the statute. Without the benefit of the input available to the legislature on the benefits or detriments of any aspect of adoption policy, the majority of this court nullifies the express and specific language of the statutes and overrides the legislature's articulated policy decisions, substituting its own. The 1996 revisions to the adoption statutes were designed to provide more predictability and certainty in the adoption process, with due regard to the rights of the biological parents, and are consistent with the goal of expeditiously moving children through the adoption process into permanent and stable homes. The court's decision today is inconsistent with those objectives and calls into question the viability of any adoption currently in process. In the end, the result of the majority opinion is to excuse appellant's failure to demonstrate his commitment to meeting the responsibilities of parenthood in the manner provided by the applicable statutes, and leaves the child in legal limbo.

{¶ 41} In this case, appellant registered with the Putative Father Registry. However, appellant failed to establish before the adoption petition was filed that he had a parent-child relationship with the child. The decision by the majority, which permits appellant's status to change based on the outcome of the juvenile court proceedings, is not authorized by the adoption statutes and is inappropriate in light of the clear directive of those statutes. Because appellant was legally a "putative father" and not a "father" at the time the adoption petition was filed, the probate court should have determined appellant's status with respect to whether his consent was necessary under R.C. 3107.07(B)(2). Failing to do so was error.

{¶ 42} I must respectfully dissent from this court's holding.

Voorhees & Levy, L.L.C., and Michael R. Voorhees, for appellants, Jason and Christy Vaughn.

McQuades Co., L.P.A., and Alan J. Lehenbauer, for appellee, Benjamin Wyrembek.

Susan Garner Eisenman and Mary Beck, urging reversal for amicus curiae, American Academy of Adoption Attorneys.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Court of Appeals No. L-09-1160
Trial Court No. 2008 ADP 000010

[Decided November 30, 2009]

In the Matter of:)
The Adoption of G.V.)
)

DECISION AND JUDGMENT

* * * * *

Michael R. Voorhees, for appellants.
Alan J. Lehenbauer, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Probate Division, that dismissed appellants' petition to adopt minor child G.V. as having been filed prematurely. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} The following undisputed facts are relevant to the issues raised on appeal. Minor child G.V. was born in October 2007. On November 1, 2007, the child's birth mother executed a permanent surrender in accordance with R.C. 5103.15 and asked a private adoption agency to take permanent custody of the infant. On November 4, 2007, J.B., the child's legal father, executed a permanent surrender in which he indicated that he was not the child's biological father. At the time the permanent surrenders were executed, the child's mother and J.B. were recently divorced. J.B. was presumed to be the legal father pursuant to R.C. 3111.03(A)(1) because he was married to the child's mother at the time the child was conceived. On November 8, 2007, G.V. was placed with appellants for the purpose of adoption.

{¶ 3} On November 15, 2007, appellee B.W. timely registered with the Ohio Putative Father Registry, seeking to initiate parental rights relative to G.V. On December 28, 2007, appellee filed a "Parentage Complaint: Petition to Establish Parental Rights and for Other Relief" in the Fulton County Court of Common Pleas, Juvenile Division. In response, appellants filed a motion requesting dismissal of the parentage complaint.

{¶ 4} On January 16, 2008, appellants filed a petition for adoption in the Lucas County Court of Common Pleas, Probate Division. On February 21, 2008, the Fulton County Juvenile Court transferred the parentage proceedings initiated by appellee to the Lucas County Court of Common Pleas, Juvenile Division, pursuant to Juv.R. 11.

{¶ 5} On April 23, 2008, appellee filed objections to the adoption. On May 19, 2008, the Lucas County Probate Court stayed the adoption proceedings pending determination of paternity by the Lucas County Juvenile Court. Thereafter, the juvenile court directed appellants, appellee, the child's birth mother and the individuals or agency with possession of G.V. to present themselves and the child for genetic testing as directed by the court. On March 17, 2009, the juvenile court issued a judgment entry declaring appellee to be the father of G.V. The juvenile court then dismissed the proceedings in that court due to the pending adoption.

{¶ 6} On June 2, 2009, a hearing was held in the probate court to address appellee's objections to the adoption. On June 4, 2009, the probate court issued the judgment entry which is the subject of this appeal dismissing the petition for adoption. In its decision, the trial court noted that the parties disagreed as to which adoption statute should be applied relative to the issue of whether or not appellee's consent to the adoption was necessary. Appellants asserted that R.C. 3107.07(B)(2), which addresses the circumstances under which the consent of a putative father is not required, should apply because appellee was a putative father when the petition to adopt was filed. Appellants asserted that appellee could not be elevated to the position of legal father once the adoption case had commenced. In response, appellee argued that, in light of the juvenile court's finding of parentage, the probate court should apply the provisions of R.C. 3107.07(A), which sets forth the circumstances under which the consent of a legal parent is not required.

{¶ 7} In response to these claims, the probate court found, pursuant to *In re Adoption of Pushcar* (2006), 110 Ohio St.3d 332, that while an issue concerning parenting of a minor child is pending in juvenile court – as was the case herein – a probate court must defer to the juvenile court and refrain from proceeding with the adoption of that child. The trial court reasoned, based on *Pushcar*, that the Supreme Court of Ohio intended the probate court to consider the findings of a juvenile court that are made while an adoption proceeding is being held in abeyance. In the case before us, appellee was found to be G.V.'s legal father while the probate case was stayed. Therefore the probate court ruled for purposes of determining the necessity of appellee's consent to the adoption that appellee is to be deemed a legal father and that the case falls under the provisions of R.C. 3107.07(A). Pursuant to R.C. 3107.07(A), a parent's consent to the adoption of a minor child is not necessary if the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the child as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the petition for adoption or placement of the minor in the home of the petitioner.

{¶ 8} The trial court concluded, based on the holding in *In re Adoption of Sunderhaus* (1992), 63 Ohio St.3d 127, paragraph two of the syllabus, that the one-year statutory period of nonsupport which obviates the requirement to obtain parental consent to an adoption began to run on March 17, 2009, the date that appellee's parentage was judicially established. The court further reasoned that since the one-year period did not begin to run until judicial ascertainment

of paternity, appellants could not prove, pursuant to R.C. 3107.07(A), that appellee had failed to communicate with the child for one year prior to the filing of the petition because the petition was filed prior to the date paternity was established. The trial court therefore found that the petition for adoption was filed prematurely. It is from that judgment that appellants filed a timely appeal.

{¶ 9} Appellants set forth the following assignments of error:

{¶ 10} "Appellants' First Assignment of Error

{¶ 11} "The Probate Court erred by finding that Appellee was no longer a putative father in the adoption proceeding.

{¶ 12} "Appellants' Second Assignment of Error

{¶ 13} "The Probate Court erred in finding that it did not have exclusive jurisdiction over the adoption proceeding.

{¶ 14} "Appellants' Third Assignment of Error

{¶ 15} "The Probate Court erred by allowing Appellee to be a party to the adoption proceeding.

{¶ 16} "Appellants' Fourth Assignment of Error

{¶ 17} "The Probate Court erred by refusing to consider all allegations set forth in the Petition that were stated as separate grounds for finding the consent of the putative father is not required."

{¶ 18} Because adoption terminates a natural parent's fundamental right to the care and custody of his children, "any exception to the requirement of parental consent [to adoption] must be strictly construed so as to protect the right of natural parents to raise and nurture their children." *In re Schoeppner's Adoption* (1976), 46 Ohio St.2d 21, 24. Further, the finding of the probate court in adoption proceedings "will not be disturbed on appeal unless such determination is against the manifest weight of the evidence." *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 204. A determination is not against the manifest weight of the evidence when it is supported by competent, credible evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279.

{¶ 19} In support of their first assignment of error, appellants assert that the trial court erred by finding that it was required by *Pushcar* to consider the juvenile court's determination of parentage made while the probate case was stayed. As explained above, *Pushcar* held that the probate court must defer to the juvenile court and refrain from addressing the matter until after adjudication in the juvenile court. Appellants cite the holding of the First District in *In the Matter of the Adoption of P.A.C.* In *P.A.C.*, the court held that where a biological father did not timely register with the putative father registry before the adoption petition was filed or otherwise safeguard his right to object to the adoption of his child, his consent to the adoption was not required even though a parentage action was pending at the time the petition was filed. In the case before us, however, appellee registered on the putative father registry 17 days after the child was born, well within the 30-day time limit allowed by law. Within two months after the child's

birth, appellee filed a parentage action; appellants filed their petition to adopt 18 days later.

{¶ 20} After appellee's paternity was established, the probate court in this case correctly acknowledged the juvenile court's finding and proceeded with the adoption case and consideration of whether appellee's consent was required for the adoption.

{¶ 21} Based on the foregoing, we find that the trial court did not err by finding that appellee was no longer a putative father in the adoption proceeding. Accordingly, appellants' first assignment of error is not well-taken.

{¶ 22} In their second assignment of error, appellants assert that the probate court erred by finding that paternity was relevant to the adoption proceeding and staying the adoption until the juvenile court determined the paternity issue. Appellants assert that since they withdrew from their petition the allegation that appellee was not the child's biological father, the issue of paternity was irrelevant to the adoption proceeding. Pursuant to *Pushcar*, however, the probate court in this case correctly determined that it could not proceed with the adoption until paternity was established by the juvenile court. Appellee's status as either a putative father or biological father would control which statutory provision would be applied to determine under what circumstances his consent would be required. In this case, if appellee were found merely to be a putative father, pursuant to R.C. 3107.07(B)(2), appellants would only have to show that he willfully abandoned or failed to support the minor child, or that he willfully abandoned the mother during her pregnancy and until

the time of the surrender or placement of the child in appellants' home. Because the issue of paternity clearly was relevant in this case, the probate court properly stayed the case pending the juvenile court's determination. Accordingly, appellants' second assignment of error is not well-taken.

{¶ 23} In their third assignment of error, appellants assert that the probate court erred by allowing appellee to be a party to the adoption proceeding. Appellants base their argument on the undisputed fact that J.B. was the child's legal father at the time that the adoption petition was filed, as he was married to mother at the time that G.V. was conceived. Appellants state correctly that since both legal parents executed permanent surrenders, their consent is not necessary for an adoption. Appellants then claim that since J.B. was the child's legal father, appellee had no legal authority either to register with the putative father registry or to file objections in the adoption case. Referring to J.B. and appellee, appellants further claim that it is a due process violation to require adoptive parents to seek the consent of "multiple classifications of fathers," at different points in time.

{¶ 24} Appellants' arguments have no merit. At no time during the pendency of this case was it asserted that appellants had to obtain the consent of the legal father. J.B. executed a permanent surrender of his parental rights when the child was six days old. In the permanent surrender, J.B. stated, "I am not the biological father." Appellants' argument as to the unfairness of adoptive parents being burdened with having to seek the consent of "multiple classifications of fathers" simply cannot be applied to the facts of this case. Should the petition to adopt G.V. be refiled,

based on the probate court's ruling, the only individual whose consent appellants would potentially need would be appellee. Appellants also incorrectly claim that appellee was not entitled to receive notice of the adoption proceeding, stating that in Ohio the only means for a putative father to be entitled to receive notice of an adoption proceeding is to timely register with the putative father registry. Since that is exactly what appellee did, this argument simply has no merit. Further, pursuant to R.C. 3107.11, appellee had a right to receive notice of the adoption petition and of the time and place of the hearing. Appellants did not give him such notice. On March 14, 2008, the probate court ordered appellants to serve appellee, as putative father, with notice of the petition. As appellants' arguments have no merit, their third assignment of error is not well-taken.

{¶ 25} In support of their fourth assignment of error, appellants assert that the probate court erred by refusing to consider all of their arguments as to why appellee's consent was not required. Ultimately, the probate court did not reach a decision as to whether appellee's consent was or was not required. This is because the court dismissed the petition to adopt as prematurely filed, for the reasons set forth above. Accordingly, this argument has no merit and appellants' fourth assignment of error is not well-taken.

{¶ 26} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

JUDGMENT AFFIRMED.

In the Matter of:
The Adoption of G.V.
C.A. No. L-09-1160

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR. JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

APPENDIX C

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SUPREME COURT OF OHIO

No. 2009-2355

[Decided October 7, 2010]

IN RE	)
ADOPTION OF G.V.	)
	)

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *In re Adoption of G.V.*, Slip Opinion No. 2010-Ohio-4879.]

Motion for reconsideration denied.

(No. 2009-2355 — Submitted September 14, 2010 — Decided October 7, 2010.)

APPEAL from the Court of Appeals for Lucas County, No. L-09-1160, 2009-Ohio-6338.

ON MOTION FOR RECONSIDERATION

{¶ 1} On July 22, 2010, the court affirmed the judgment of the court of appeals in this case. *In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349, 933 N.E.2d 245.

{¶ 2} Appellants, Jason and Christy Vaughn, have filed a motion for reconsideration.

{¶ 3} The motion for reconsideration is denied. The stay issued in this case on September 28, 2010, is lifted.

PFEIFER, LUNDBERG STRATTON, O'CONNOR, and O'DONNELL, JJ., Concur.

BROWN, C.J., and LANZINGER and CUPP, JJ., dissent.

O'DONNELL, J., concurring.

{¶ 4} I concur in the majority's decision to deny the motion for reconsideration, for the following reasons.

{¶ 5} In a series of paternity and adoption decisions involving issues of statutory interpretation, this court has charted a course to guide juvenile, family, and probate court judges who confront difficult, emotional, and significantly consequential questions in trying to

decide which party ought to have care and custody of minor children.

{¶ 6} The separation of children from family members is a matter of grave consequence with lasting implication. While we endeavor to utilize our individual and collective best judgment in resolving cases, differences of opinion have divided our court as we interpret R.C. Chapter 3107, specifically, R.C. 3107.06 and 3107.07. Although our opinions have provided a framework for judges to follow, questions still exist in this difficult area of law.

{¶ 7} Our decision in *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, directs that when an issue concerning parenting of a minor is pending in a juvenile court, a probate court must refrain from proceeding with the adoption of that child. That holding affords litigants an opportunity to present a case to the juvenile court in a timely fashion and affords the juvenile court a reasonable opportunity to adjudicate the matter without regard to the pendency of a related matter in the probate court, thus avoiding the circumstance of a race to judgment in different courts.

{¶ 8} In the instant matter, we confront a related question where a litigant has timely registered with the Putative Father Registry and timely filed a petition in juvenile court to establish parentage of his minor child. Subsequent to filing that complaint in the juvenile court, the prospective adoptive parents filed a petition for adoption in the probate court. Although the putative father asked the juvenile court to determine whether he is the biological father, the prospective adoptive parents alleged in probate court that as a

putative father, he failed to meet statutory obligations for support, and hence, his consent to adoption was not necessary. The probate court stayed the adoption proceeding pursuant to *Pushcar*, pending the paternity determination in the juvenile court. Thereafter, the juvenile court ruled that Benjamin Wyrembek is the biological father of G.V., and the probate court then lifted its stay and adjudicated the adoption petition. The probate court deemed Wyrembek to be the legal father, although it also recognized him as a putative father at the time of the filing of the adoption petition. The court held that R.C. 3107.07(B) no longer applied and ruled that since one year had not expired since the paternity finding, it could not be shown that Wyrembek's consent was not required for the adoption.

{¶ 9} Thus, the facts present this court with a situation in which a putative father timely registers with the Putative Father Registry and files a complaint for determination of parentage in the juvenile court, the prospective adoptive parents file a petition for adoption in the probate court while the parentage action is pending in the juvenile court, and the probate court stays that adoption awaiting a determination from the juvenile court.

{¶ 10} The parties to the adoption proceeding assert that different statutory provisions should be applied to ascertain whether Wyrembek's consent is necessary for the pending adoption. The prospective adoptive parents urge that R.C. 3107.07(B)(2)(b) and (c) apply because they assert Wyrembek was a putative father when they filed the adoption petition. Those sections provide that the consent of a putative father is not required if he has willfully abandoned or failed to care for and support the minor or has willfully

abandoned the mother of the child during her pregnancy and up to the time she surrendered the child or placed the child in petitioner's home. Wyrembek contends that R.C. 3107.07(A) applies because the juvenile court found him to be the biological father of G.V. and he has not failed to communicate with G.V. or provide maintenance and support for a period of at least one year preceding the filing of the adoption petition. Our decision in *In re Adoption of Sunderhaus* (1992), 63 Ohio St.3d 127, 585 N.E.2d 418, directs courts to calculate the one year from the date paternity is established.

{¶ 11} The issue dividing our court is whether for purposes of the statutory consent requirement, the status of the father can change - from putative to biological - after the petition for adoption is filed or whether that status is fixed as of the date petitioner files the adoption petition. This seems to me to be settled by our case authority. This question is critical to the parties in this case, because as a putative father, the prospective adoptive parents assert they would prevail because Wyrembek failed to comply with R.C. 3107.07(B)(2)(b) and (c). But because the juvenile court has determined Wyrembek to be G.V.'s biological father, R.C. 3107.07(A) specifies when consent of a biological father is required, and that statute, for whatever reason, does not contain the obligation of a putative father not to willfully abandon or fail to care for and support the minor or willfully abandon the mother during her pregnancy and until she surrenders the minor or the minor is placed in the home of the petitioner. Accordingly, Wyrembek maintains that his consent to adoption is necessary and he would prevail if R.C. 3107.07(A) applies.

{¶ 12} It is apparent to me that the General Assembly is aware of our decisions in this area. Following *Sunderhaus*, 63 Ohio St.3d 127, 585 N.E.2d 418, where we clarified that a putative father had no duty to support a mother or minor child, the legislature enacted a statutory duty for a putative father and provided that if such support was not demonstrated, his consent for adoption was not required. However, it never incorporated an obligation on a biological father to support a mother during pregnancy and provided that a biological father's consent was necessary unless support and communication had not been provided for at least one year.

{¶ 13} The father of a child who registers with the Putative Father Registry in a timely fashion and who pursues a juvenile court determination of parentage cannot control either the timing of the juvenile court's decision or the timing of the filing of a petition to adopt by prospective adoptive parents. I would urge juvenile courts to give priority to parentage cases and decide them with dispatch. I would also encourage the General Assembly to carefully scrutinize our caselaw and revisit these statutes to clarify its intent if contrary to our result.

{¶ 14} We are not a policy-making branch of government, as we are not structured to weigh considerations of interest groups or to conduct public hearings on this matter. Rather, our responsibilities are only to decide disputed questions of fact and interpret and apply the law as enacted by the General Assembly. In accord with our role to interpret statutes, it is apparent to me that for purposes of consent to adoption, a biological father has no statutory duty to

care for and support a minor other than that required by R.C. 3107.07(A) or to care or support the mother of a minor during pregnancy or up to the time of placement.

{¶ 15} Accordingly, I agree with the court's decision to deny reconsideration in this case.

LUNDBERG STRATTON and O'CONNOR, JJ., concur in the foregoing opinion.

Voorhees & Levy, L.L.C., and Michael R. Voorhees, for appellants.

McQuades Co., L.P.A., and Alan J. Lehenbauer, for appellee, Benjamin Wyrembek.

Susan Garner Eisenman and Mary Beck, urging reconsideration on behalf of amicus curiae, American Academy of Adoption Attorneys.

APPENDIX D

Permanent Surrender of Drucilla Bocvarov,
November 1, 2008

[*Fold-out Exhibit, see next page*]

FEB. 14. 2008 3:27PM PATRICIA HAMILTON LAW OFFICES NO. 7221 P. 2/3

PERMANENT SURRENDER OF CHILD

I, Drucilla Rose Bezverov (Adult's name) am 38 years old and am the Parent/Guardian of Grayson Thomas Vaughn (child's name)

born on 10/29/07 (date of birth) in Maumee (city/twp) Lucas (county of birth) Ohio (state of birth)

who currently lives at [redacted] (parent's street/city/state) Toledo, Ohio 43606 sign this permanent surrender

as the child's ☒ mother, ☐ father, ☐ putative father, ☐ guardian, and hereby request Adoption By Gentle Care (agency name)

to take permanent custody and control of the child. I am unable to care for said child for the following reasons: I am a single parent and due to finances, I am currently parenting two other children

The Assessor has provided the following counseling and discussed alternatives to the surrender: Pre & Post Adoption Options Temporary Custody W/ Foster Care, Reviewed & Signed the Ohio Laws & Adoption Materials Form

Date on which this was provided: 10/14/07 Name of Assessor: Megan Kennedy, LSW

I agree and understand that under Ohio law, signing this document means:

1. All my rights as a parent to the above named child will end. This includes, but is not limited to, all rights to visitation, communication, support, religious affiliation and the right to consent to the child's adoption.
2. The Agency shall have permanent custody of the child and shall have the right to place the child in any adoptive home or other substitute care settings it finds in the child's best interest (Ohio Revised Code Sections 3107.01 and 3107.08).

This permanent surrender was taken at 11:20 (time) ☒ AM ☐ PM, on the ___ (day) of November (month) 20 07 (year) in the following location: Maumee, Ohio

I have read this permanent surrender or it was read to me before I signed it. I was given the opportunity to ask questions concerning this permanent surrender and those questions were fully answered to my satisfaction. I understand and agree to the terms of this permanent surrender of my child. I am signing this permanent surrender of my child voluntarily and at least 72 hours after the birth of the child.

Witness	Date	Signature of Parent/Guardian	Date
Megan Kennedy, LSW Stephanie M. Schultz	11-1-07	Drucilla Bezverov	11-1-07

By my signature below, John E. Cameron (agency representative's name) by virtue of my authority as Executive Director (agency representative's title) of Adoption By Gentle Care (agency name)

which is an agency duly authorized pursuant to Ohio Revised Code Sections 5103.03 and 5103.16, to accept permanent custody of children by surrender, hereby accept permanent custody of Grayson Thomas Vaughn (child's name) Drucilla Rose Bezverov (parent's name)

Witness	Date	Signature of Authorized Agency Representative	Date
Megan Kennedy, LSW	11-1-07	John E. Cameron	11-1-07

Under Ohio law, Ohio Revised Code Section 5103.16(B), approval of the juvenile court is required if this agreement is entered into by a public children services agency or is executed by a private child-placing agency for a child six months of age or older.

By my signature, below, I hereby approve the transfer of permanent custody of (child's name) _____

by the child's parent/guardian to the (agency name) _____

I find that continuation in the home is contrary to the best interest of the child and that the placement is in the best interest of the child.

Name of Court	Signature of Judge	Date

This has been duly recorded on page number _____ of volume number _____ of the records of this court.

Distribution: White-Agency; Canary-Parent; Pink-Court

JFS 01669 (Rev. 8/2003)

APPENDIX E

Permanent Surrender of Jovan Bocvarov,
November 4, 2008

[*Fold-out Exhibit, see next page*]

Feb. 14. 2008 5:22PM Gr. PATRICK HAMILTON LAW OFFICE229 T-No. 4227 P.01/02 F-252

Ohio Department of Job and Family Services

PERMANENT SURRENDER OF CHILD

I, Jovan Bocvarov am 35 years old and am the Parent/Guardian of Grayson Thomas Vaughn
(Legal) (full name) (child's name)

born on 10/29/07 in Maumee (city of birth) Lucas (county of birth) Ohio (state of birth)

who currently lives at [redacted] (parent's street address/city/state) Sylvania, Ohio 43560 sign this permanent surrender

as the child's ☐ mother, ☒ father, ☐ putative father, ☐ guardian, and hereby request Adoption By Gentle Care (agency name)

to take permanent custody and control of the child. I am unable to care for said child for the following reasons: I am not the biological Father

The Assessor has provided the following counseling and discussed alternatives to the surrender: Pre & Post Adoption Options Temporary Custody W/ Foster Care. Reviewed & Signed Ohio Laws & Adoption materials form

Date on which this was provided: 11/1/07 Name of Assessor: Megan Kennedy Law

I agree and understand that under Ohio law, signing this document means:

1. All my rights as a parent to the above named child will end. This includes, but is not limited to, all rights to visitation, communication, support, religious affiliation and the right to consent to the child's adoption.
2. The Agency shall have permanent custody of the child and shall have the right to place the child in any adoptive home or other substitute care settings it finds in the child's best interest (Ohio Revised Code Sections 3107.01 and 3107.06).

This permanent surrender was taken at 1:27 (time) ☐ AM ☒ PM, on the 4 (day) of November (month), 2007 (year) in the following location: Toledo, Ohio

I have read the permanent surrender or it was read to me before I signed it. I was given the opportunity to ask questions concerning this permanent surrender and those questions were fully answered to my satisfaction. I understand and agree to the terms of this permanent surrender of my child. I am signing this permanent surrender of my child voluntarily and at least 72 hours after the birth of the child.

Witness	Date	Signature of Parent/Guardian	Date
Megan Kennedy Law John E. Cameron	11/4/07	Jovan Bocvarov	11/04/07

By my signature below, I John E. Cameron (agency representative's name) by virtue of my authority as Executive Director (agency representative's title) Adoption By Gentle Care (agency name) which is an agency duly authorized pursuant to Ohio Revised Code Sections 5103.03 and 5103.16, to accept permanent custody of children by surrender, hereby accept permanent custody of Grayson Thomas Vaughn (child's name) from Jovan Bocvarov (parent's name).

Witness	Date	Signature of Authorized Agency Representative	Date
Megan Kennedy Law	11/4/07	John E. Cameron	11/4/07

Under Ohio law, Ohio Revised Code Section 5103.15(B), approval of the juvenile court is required if this agreement is entered into by a public children services agency or is executed by a private child placing agency for a child six months of age or older.

By my signature, below, I hereby approve the transfer of permanent custody of (child's name) _____

by the child's parent/guardian to the (agency name) _____

I find that continuation in this home is contrary to the best interest of the child and that the placement is in the best interest of the child.

Name of Court	Signature of Judge	Date

This has been duly recorded on page number _____ of volume number _____ of the records of this court.

Distribution: White-Agency; Canary-Parent; Pink-Court

JFS 01656 (Rev. 5/2006)

APPENDIX F

ICPC Approval document, November 8, 2008

[*Fold-out Exhibit, see next page*]

Ohio Department of Job and Family Services

INTERSTATE COMPACT PLACEMENT REQUEST (ICPC 100-A)

05779

TO: (Name and Address of ICPC Administrator or Receiving State)
Deputy Compact Adm. Programs & Services Div.
MS 08 402 W. Washington St. Rm W-364
Indianapolis, IN 46204-2739

FROM: ODJFS ICPC OFFICE
P.O. Box 182709
COLUMBUS OH 43218-2709
614-466-1213

SECTION 1: IDENTIFYING INFORMATION

Child's Name	Date of Birth	Male / Female	Ethnic Group
Grayson Thomas Vaughn	10/29/07	X Male	Hispanic/ Caucasian

Mother's Name	Father's Name
T.P.R.	T.P.R.

Name of Agency or Person Responsible for Planning for Child: Adoption By Gentle Care — Telephone: (614) 469-0007
Address, City, State, Zip Code: 380 N. E. Town Street, Columbus, Ohio 43215

Name of Agency or Person Financially Responsible for Child: Adoption By Gentle Care — Telephone: (614) 469-0007
Address, City, State, Zip Code: 380 N. E. Town Street, Columbus, Ohio 43215

SECTION 2: PLACEMENT INFORMATION (CHECKED BOX APPLIES)

Name of Person(s) or Facility Child is To Be Placed With: Jason & Christy Vaughn — Telephone: [redacted]
Address, City, State, Zip Code: [redacted] Sellersburg, IN 47172

Type of Care (Check One)

☐ Foster Family Care	☐ Parent	**ADOPTION TO BE FINALIZED IN**
☐ Group Home Care	☐ Relative (Relationship)	☐ Sending State
☐ Residential Treatment	☒ Adoption	☒ Receiving State
☐ Child-Caring Institution	☐ Other:	
☐ Institutional Care Article VI		

Legal Status (Check One)

☐ Sending Agency Custody/Guardianship	☒ Parental Rights Terminated - Right to Place for Adoption
☐ Parent/Relative Custody/Guardianship	☐ Unaccompanied Refugee Minor
☐ Court Jurisdiction Only	☐ Other:

Financial Status (Check all Applicable Items)

☐ IV-Eligible	☐ IV-E Adoption Assistance	☐ IV-E Foster Care Maintenance	☐ Other:

SECTION 3: SERVICES REQUESTED (CHECKED BOX APPLIES)

Initial Report (If Applicable)	Supervisory Services	Supervisory Reports
☐ Adoption Home Study	☒ Another Agency Agreed to Supervise	☐ Monthly
☐ Foster Home Study	☐ Request Receiving State to Supervise	☐ Quarterly
☐ Parent Home Study	☐ Sending Agency Agreed to Supervise	☐ Upon Request
☐ Relative Home Study		☒ Other: monthly visits over 6 mos until finalization.

Name and Address of Supervising Agency in Receiving State: Childplace, 2420 E. 10th Street, Jeffersonville, IN 47130

Enclosed Documents (Check all Applicable Items)

☒ Child's Social History	☐ Court Order	☒ Home Study Placement Resource	☒ Other Enclosures

Signature of Sending Agency or Person: [signature] — Date Signed: 11/5/07
Signature of Sending State ICPC Administrator or Alternate: [signature] — Date Signed: 11/15/07

SECTION 4: ACTION BY RECEIVING STATE

☒ Placement May Be Made ☐ Shall not Be Made — REMARKS
Signature of Receiving State ICPC Administrator or Alternate: [signature] — Date Signed: 11-8-07

DISTRIBUTION Sending Agency Retains One (1) Copy and Forwards Five (5) Copies to Ohio's ICPC Office

JFS 01668 (2/2007)

APPENDIX G

PROBATE COURT OF LUCAS COUNTY, OHIO

[Filed January 16, 2008]

LUCAS CO. PROBATE COURT
JACK R. PUFFENBERGER JUDGE

IN THE MATTER OF THE ADOPTION OF GRAYSON THOMAS VAUGHN
(Name after adoption)

CASE NO. 2008 ADP 000010

PETITION FOR ADOPTION OF MINOR
[R.C. 3107.05]

The undersigned petitions to adopt Grayson Thomas Vaughn, a minor, and to change the name of the minor to Grayson Thomas Vaughn.

PETITIONER

The petitioner states the following:

Full Name: Jason Edward Vaughn Age 36

Full Name: Christy Lynn Vaughn Age 33

Place of Residence: [REDACTED]
Street Address

Sellersburg			Floyd
City of Village or Township if unincorporated area			County
	Indiana	47172	6 years
Post Office	State	Zip Code	Duration of Residence

Marital Status: married Date and Place of Marriage: [REDACTED]

Relationship of Minor to Petitioner: None

The Petitioner has facilities and resources suitable to provide for the nurture and care of the minor and it is the desire of the petitioner to establish the relationship of parent and child with the minor.

MINOR TO BE ADOPTED

Birth Name: Grayson Thomas Vaughn

Date of Birth: October 29, 2007

Place of Birth: St. Luke Hospital, Maumee, Ohio

Property and Value: none

☒ The minor is living in the home of the petitioner, and was placed therein for adoption on the 1st day of November, 2007 by Adoption By Gentle Care.

☐ The minor is not living in the home of the petitioner, and resides at _____.

☐ The minor will be an adopted person as defined in R.C. 3107.39;

☒ The minor will be an adopted person as defined in R.C. 3107.45;

A certified copy of the birth certificate of the minor is filed with this petition or is not available due to the following: _____.

A Preliminary Estimate Accounting (Form 18.9), if required, is filed with this petition.

The minor is in the permanent custody of Adoption By Gentle Care whose address is 380 ½ East Town Street, Columbus, Ohio 43215.

PERSONS OR AGENCIES WHOSE CONSENT TO THE ADOPTION IS REQUIRED

☒ Adoption by Gentle Care, the agency has permanent custody of the minor filed under _____, _____. ☐ Consent filed.

PERSONS WHOSE CONSENT TO THE ADOPTION IS NOT REQUIRED

A The consent of Drucilla Rose Bocvarov birth-mother
Name Address Relationship

B The consent of Jovan Bocvarov legal father
Name Address Relationship

C The consent of _____ putative father
Name Address Relationship

are not required because:

birth-mother and legal father entered into voluntary permanent surrender agreements with Adoption By Gentle Care and their consents are not required pursuant R.C. 3107.07(C); the consent of the putative father is not required based on any of the following: a) the husband of the birth-mother is the presumed legal father pursuant to R.C. 3111.03(A)(1) and the putative father has no standing in this adoption proceeding and is not entitled to any notice of this adoption proceeding; b) the putative father is not the father of the minor; c) the putative father has willfully abandoned or failed to care for and support the minor; d) the putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner; e) R.C. 3107.06(C), which states that "Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent of the adoption has been executed by all of the following:...(C) The putative father of the minor; . ." is unconstitutional in its application to this placement and petition, where the right of the birth-mother to place this infant at birth for adoption is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution; f) the biological parent must have legal custody of the minor to have any rights and the putative father, by definition, cannot have legal custody and therefore has no rights; g) the adoption is in the best interest of the child

/s/ Michael R. Voorhees
Attorney for Petitioner

Michael R. Voorhees
Typed or Printed Name

11159 Kenwood Road
Street Address

Cincinnati Ohio 45242
City State Zip Code

(513) 489-2555
Phone Number (include area code)

Attorney Registration No. 0039293

/s/ Jason Vaughn
Petitioner

Jason Edward Vaughn
Typed or Printed Name

/s/ Christy Vaughn
Petitioner

Christy Lynn Vaughn
Typed or Printed Name

[REDACTED]
Street Address

Sellersburg Indiana 47172
City State Zip Code

[REDACTED]
Phone Number (include area code)

18.0 – PETITION FOR ADOPTION OF MINOR

10/1/97

APPENDIX H

IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO
PROBATE DIVISION

CASE NO. 2008 ADP 000010

[Filed June 4, 2009]

IN THE MATTER OF:	)
	)
THE ADOPTION OF	)
GRAYSON THOMAS VAUGHN	)
	)

JUDGMENT ENTRY

This matter comes before the Court pursuant to a Petition For Adoption of Minor filed January 16, 2008 by Attorney Michael R. Voorhees on behalf of petitioners Jason and Christy Vaughn (Vaughns).

The child who is the subject of this adoption petition was born on October 29, 2007 in Lucas County, Ohio. On November 1, 2007 the child's birth mother, Drucilla Rose Bocvarov, executed a permanent surrender of this child to Adoption By Gentle Care, which is a private child placing agency (PCPA). Her former husband, Jovan Bocvarov, also executed a permanent surrender to the PCPA on November 4, 2007. Drucilla's permanent surrender indicated that at the time of surrender she was a "single parent" and

Jovan's permanent surrender indicated that he was "not the biological father" of this child. The Bocvarovs had been divorced during the time of Drucilla's pregnancy, however since they were married at the time of conception of this child, Mr. Bocvarov is deemed to be the presumed natural father of this child. R.C. 3111.03(A)(1). Adoption By Gentle Care accepted the surrenders and forthwith placed the child with the Vaughns for purpose of adoption. The child has remained with the Vaughns since early November of 2007.

On November 20, 2007, Benjamin Wyrembek timely registered with the Ohio Putative Father Registry, seeking to initiate parental rights relative to the child herein. Also, on December 28, 2007, Mr. Wyrembek filed a Parentage Complaint; Petition to Establish Parental Rights and for other relief in the Fulton County Court of Common Pleas, Juvenile Division. The Vaughns filed a motion in Fulton County Juvenile Court on January 28, 2008 requesting dismissal of Benjamin Wyrembek's parentage complaint. Fulton County Juvenile Court transferred the proceedings initiated by Benjamin Wyrembek to the Lucas County Court of Common Pleas, Juvenile Division, pursuant to Juvenile Rule 11 on February 21, 2008.

Petitioners herein filed a Motion for Declaratory Judgment on January 16, 2008 which was denied by this Court. In denying this motion in its Judgment Entry of March 14, 2008, the Court specifically ordered the putative father to be served with notice of the Petition for Adoption. Benjamin Wyrembek was served and thereafter filed an objection to the adoption in the Lucas County Probate Court on April 23, 2008.

This Court further ruled on May 19, 2008 that this adoption matter should be deferred until the issue of paternity of the child, which was pending in juvenile court prior to the filing of this adoption petition, was determined. *In re Adoption of Joshua Tai T*, OT-07-055, Ohio Sixth Appellate District, 2008. Accordingly, the Court held this matter in abeyance pending the parentage determination. On March 17, 2009, the Lucas County Court of Common Pleas, Juvenile Division, issued a Judgment Entry declaring Benjamin Wyrembek to be the father of the child who is the subject of this adoption petition. (JC08-180254)

This Court then conducted a telephonic pretrial on April 2, 2009, wherein all legal arguments and evidentiary hearings were to commence June 2, 2009.

This matter comes before the Court pursuant to an amended objection and two complaints for declaratory judgment filed April 7, 2000 by Attorney Alan J. Lehenbauer on behalf of Benjamin Wyrembek. Responsive pleadings were filed by Attorney Michael Voorhees on behalf of petitioners Jason Edward Vaughn and Christy Lynn Vaughn. In addition, Mr. Lehenbauer filed a Supplemental Memorandum in Support of Complaint for Declaratory Judgment on May 27, 2009. Pursuant to this Court's order of April 2, 2009, these legal issues were scheduled for hearing on June 2, 2009, prior to an evidentiary hearing on the petition and determination of best interest of the child.

Case called for hearing. Attorney Michael R. Voorhees present with petitioners Jason Edward Vaughn and Christy Lynn Vaughn. Attorney Alan J. Lehenbauer present with Benjamin J. Wyrembek. Attorney Heather Fournier, who was appointed by this

Court as guardian ad litem of the child, also present. Arguments held relative to all pending legal issues.

After due consideration of the legal arguments presented, the Court hereby finds as follows: The parties have provided voluminous cases and statutes for the Court to consider in rendering a decision relative to the pending legal motions. In addition to the well known cases of *In re Adoption of Sunderhaus*, (1992) 63 Ohio St.3d, 127, and *In re Adoption of Pushcar*, (2006) 110 Ohio St.3d 332, the Court has considered numerous other relevant cases. The case of *Nale v. Robertson*, (1994) 871 S.W.2d 674, was decided by the Supreme Court of Tennessee. The *Nale* case provides an excellent history of various aspects of adoption law in the United States. The *Nale* case tracks many of the cases cited by counsel in this matter including *Stanley v. Illinois*, (1972) 405 U.S. 645 and *Lehr v. Robertson*, (1983) 463 U.S. 248. As stated in the *Nale* case, *supra*, parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their children. The United States Supreme Court has addressed several cases relating to the issue of a father's liberty in his relationship with a child born out of wedlock. *Stanley*, *supra*, and *Lehr v. Robertson*, *supra*. Specifically the *Nale* case stated, "no parent should be denied the privilege of parenthood merely because of birth out of wedlock." In the *Nale* case, the court found that Robertson had made every reasonable effort to establish a personal as well as legal relationship between himself and his son. He therefore has established fundamental liberty interests in the child. The right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law. *Santosky v. Kramer* (1982), 455

U.S. 745, 753, 102 S.Ct. 1388. Adoption terminates those fundamental rights. See 3107.15(A)(1). For this reason; "any exception to the requirement of parental consent (to adoption) must be strictly construed so as to protect the right of natural parents to raise and nurture their children". *In re Schoeppner's Adoption* (1976), 46 Ohio St.2d 21, 24. The Court of Appeals for the Sixth District of Ohio has stated in the case of *In re Smith* (1991), 77 Ohio App.3d 1, 16, that the termination of parental rights is the family law equivalent of the death penalty in a criminal case. The parties to such an action must be afforded every procedural and substantive protection the law allows.

The parties in this matter have agreed that the probate court has original and exclusive jurisdiction over this adoption proceeding. This Court relied on the *Pushcar* decision in its order of May 19, 2008 and specifically reiterates that the parentage action in this matter was filed prior to and was pending at the time the adoption petition was filed in this court. Accordingly, the Court refrained from proceeding with the adoption petition during the pendency of the parentage action. It is the opinion of this Court that it now has jurisdiction to consider the petition for adoption since the juvenile court has adjudicated the parentage matter to its conclusion. In this matter, the parties have a difference of opinion in relation to which adoption statute should be applied relative to the necessity of Mr. Wyrembek's consent, Petitioners allege that R.C. 3707.07(B)(2)(c) applies since Mr. Wyrembek was a putative father when the petition was filed. Petitioners further allege that Mr. Wyrembek is unable to elevate himself to the level of a legal father once the adoption case has been commenced. Counsel for Mr. Wyrembek argues that

this Court should consider the finding of parentage in the juvenile court, and therefore utilize the provisions of R.C. 3107.07(A) in determining whether Mr. Wyrembek's consent is required. It should be noted that R.C. 3107.07(B) relates to the consent of putative fathers and Section 3107.07(A) relates to the consent of legal fathers. Were the Court to proceed in this matter under R.C. 3107.07(B), the issue would be whether Mr. Wyrembek abandoned the birth mother during the time of her pregnancy and up to her time of her surrender of the child. Should the Court rule that Section 3107.07(A) applies, the issue would be whether Mr. Wyrembek failed to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition without justifiable cause.

This Court finds the facts in the instant matter strikingly similar to the facts *In the Matter of the Adoption of JLM*, Case Number 200678, decided in the Probate Court of Stark County, Ohio on April 8, 2008. In *JLM*, as in this case, the father timely registered with the Putative Father Registry and filed a complaint to establish paternity prior to the filing of the Petition for Adoption. The Probate Court in *JLM* deferred to the juvenile court to establish paternity pursuant to *Pushcar*, *supra*. Upon the order of the juvenile court finding the parent-child relationship, the probate court dismissed the Petition for Adoption applying *Sunderhaus*, *supra*. The court held that the duty to communicate and support referred to in R.C. 3107.07(A) commenced upon the establishment of paternity. Since one-year had not passed since the paternity determination, the petition was considered premature and therefore dismissal was required.

This Court finds that when a parentage action is pending prior to the filing of the adoption petition, the Court must apply *Pushcar*. It must be logically assumed that the Supreme Court of Ohio intended the probate court to consider the findings of the juvenile court made while the adoption proceeding is being held in abeyance. In this case, the juvenile court has ruled that Mr. Wyrembek is the father of the child who is the subject of this adoption proceeding, therefore the Court hereby rules that for purposes of determining the necessity of Mr. Wyrembek's consent, he is to be deemed a legal father.

Accordingly, the Court rules that Section 3107.07(B) no longer applies to Mr. Wyrembek although he was a putative father when the petition was filed by virtue of his putative father registration. The judicial determination of a parentage action filed prior to the petition for adoption changes his status in this matter and he is now a legal father and falls under the provisions of R.C. 3107.07(A). In this regard, the Court notes that the one-year period prescribed by Revised Code Section 3107.07(A) commenced on the date that parentage has been judicially established. *In re Adoption of Sunderhaus (1992), 63 Ohio St.3d 127, 132*. Since one year had not expired prior to the placement of the child or the filing of the petition and one year has not expired since the paternity finding, it is impossible to show that Mr. Wyrembek's consent is not required pursuant to Section 3107.07(A). Accordingly, the Court finds the Petition for Adoption has been filed prematurely and therefore it is hereby dismissed.

Therefore, the Court hereby grants Mr. Lehenbauer's Complaint for Declaratory Judgment in

part; specifically ruling that Mr. Wyrembek is now a legal father subject to the provisions of Section 3107.07(A) in this adoption proceeding. The Court further finds that all other legal issues pending, including the constitutionality of Chapter 3107, to be moot based upon the above ruling.

It is so ordered.

6/4/09	/s/ Jack R. Puffenberger
DATE	JUDGE JACK R. PUFFENBERGER

Copies mailed this date to:

Attorney Alan J. Lehenbauer
Attorney Michael R. Voorhees
Attorney Heather J. Fournier

APPENDIX I

IN THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, OHIO

APPEAL NO. L-1160

TRIAL NO. 2008 ADP 000010

[Filed August 24, 2009]

IN THE MATTER OF THE ADOPTION OF: G.V.	)
JASON EDWARD VAUGHN and CHRISTY LYNN VAUGHN	)
APPELLANTS	)
BENJAMIN WYREMBEK	)
APPELLEE	)

BRIEF OF APPELLANTS JASON AND CHRISTY VAUGHN

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mike@ohioadoptionlawyer.com
Attorney for Appellants

Alan J. Lehenbauer (0023941)
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(419) 826-0055 phone
(419) 825-3871 fax
Attorney for Appellee

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III. **ARGUMENT** 2

Appellants' First Assignment of Error

The Probate Court erred by finding that Appellee was no longer a putative father in the adoption proceeding. 2

Issue presented for review and argument

Ohio law clearly defines "putative father" and the putative father may be entitled to notice of the adoption if he timely registers with the putative father registry and he may entitled to be a party in the adoption proceeding, but only as a putative father if the petition has been filed. 2

Authorities Cited:
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Appellants' Second Assignment of Error

The Probate Court erred in finding that it did not have exclusive jurisdiction over the adoption proceeding. 7

Issue presented for review and argument

Under Ohio law, the Probate Court has original and exclusive jurisdiction over adoption proceedings and any proceeding in another court that does not affect the substantive issues of the adoption is not relevant. 7

Authorities Cited:
State ex rel. Portage Co. Welfare Dept. v. Summers (1974), 38 Ohio St. 2d 144 ... 7
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Appellants' Third Assignment of Error

The Probate Court erred by allowing Appellee to be a party to the adoption proceeding. 11

Issue presented for review and argument

Under Ohio law, there is no requirement to search the putative father registry if there is a legal father. 11

Authorities Cited:
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Appellants' Fourth Assignment of Error

The Probate Court erred by refusing to consider all allegations set forth in the Petition that were stated as separate grounds for finding the consent of the putative father is not required. 14

Issue presented for review and argument

The due process rights of Appellants were violated when the Probate Court failed to even consider the separately stated grounds set forth in the Petition. 14

Authorities Cited:
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II. STATEMENT OF THE CASE

A. Procedural Posture

This matter relates to Grayson, a minor born on October 29, 2007 at St. Luke Hospital in Lucas County, Ohio. The birth-mother of the child is Drucilla Bocvarov. On November 1, 2007, Drucilla Bocvarov executed her Permanent Surrender in accordance with R.C. 5103.15 and requested Adoption By Gentle Care (the "Agency") to take permanent custody of the child. (T.d. 2) On November 4, 2007, Jovan Bocvarov, the legal father of Grayson, executed his Permanent Surrender in accordance with R.C. 5103.15 and requested the Agency to take permanent custody of the child. (T.d. 2) The Agency is a duly licensed private child placing agency, as defined in R.C. 2151.011(A)(3), located at 380½ E. Town Street, Columbus, Ohio 43215 in Franklin County, Ohio. The Agency accepted the permanent custody of Grayson on November 4, 2007 and placed the child in an adoptive placement with Appellants. The placement received ICPC (Interstate Compact on the Placement of Children) approval on November 8, 2007. The child has resided in the home of Appellants in a supervised adoptive placement since the ICPC approval date of November 8, 2007. On November 15, 2007, Appellee registered with the Ohio Putative Father Registry. On January 16, 2008, Appellants filed a Petition for Adoption in the Lucas County Probate Court. (T.d. 1) On February 21, 2008, the filing that was previously filed by Appellee in the Fulton County Juvenile Court was transferred to the Lucas County Juvenile Court. On May 19, 2008, the Lucas County Probate Court stayed the adoption proceedings. On February 27, 2009, Appellants conditionally agreed to DNA testing. On

March 17, 2009, the Lucas County Juvenile Court entered a finding that Appellee is the biological father and dismissed the entire proceeding in Juvenile Court due to the pending adoption. On June 4, 2009, the Probate Court dismissed the Petition for Adoption.(T. d. 74) From that June 4, 2009 order of the Lucas County Probate Court, this appeal was timely taken.

B. Statement of Facts

The Petition for Adoption was filed in the Lucas County Probate Court on January 16, 2008. (T.d. 1) On the date the Petition was filed, it is undisputed that paternity was not yet established and that Appellee was a putative father as defined in R.C. 3107.01(H).

III. ARGUMENT

Appellants' First Assignment of Error

The Probate Court erred by finding that Appellee was no longer a putative father in the adoption proceeding.

Issue presented for review and argument

Ohio law clearly defines "putative father" and the putative father may be entitled to notice of the adoption if he timely registers with the putative father registry and he may entitled to be a party in the adoption proceeding, but only as a putative father if the petition has been filed.

In this adoption proceeding, Appellee is a putative father. A "putative father" is defined in Section 3107.01(H) of the Ohio Revised Code as follows:

> (H) "Putative father" means a man, including one under age eighteen, who may be a child's father and to whom all of the following apply:
> (1) He is not married to the child's mother at the time of the child's conception or birth;
> (2) He has not adopted the child;
> (3) He has not been determined, ***prior to the date a petition to adopt the child is filed***, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative agency proceeding in another state;
> (4) He has not acknowledged paternity of the child pursuant to sections 3111.21 to 3111.35 of the Revised Code. ***(emphasis added)***

Subsections (H)(1), (2), (3) and (4) of R.C. 3107.01 all clearly apply to Appellee. Under subsection (H)(3), the finding of a parent and child relationship was required to be determined ***prior to the date a petition to adopt the child was filed.*** The Petition for Adoption was filed on January 16, 2008. (T.d. 1) There was no determination of a parent and child relationship ***prior*** to January 16, 2008. Any determination of a parent-child relationship made after January 16, 2008 is meaningless in the adoption proceeding. The child has been in an ICPC approved adoptive placement since November 8, 2007. On November 15, 2007, Appellee

registered with the Ohio Putative Father Registry, thereby acknowledging that he is a putative father. The first action taken by Appellee was the registration on November 15, 2007, which is after the adoptive placement had occurred and before he filed a paternity action.

The statutory language of R.C. 3107.01(H)(3) is clear and unambiguous. If paternity was not established "prior to the date a petition to adopt the child was filed," then he is a putative father. The word "prior" in R.C. 3107.01(H)(3) can have no other meaning. The Ohio legislature has determined that for a putative father to be entitled to notice of an adoption proceeding, the putative father must register with the Putative Father Registry not later than thirty days after the birth of the child. R.C. 3107.07(B)(1) states that the consent to adoption is not required of the putative father if he fails to timely register. There is no other filing, procedure, or way for the putative father to assert his rights in an adoption proceeding in Ohio. There is no Ohio statutory provision that states a putative father is entitled to notice of the adoption proceeding, or to be a party in an adoption proceeding, by filing a paternity action. The paternity action is separate and is not relevant to the adoption proceeding. If Appellee had failed to register and had only filed a paternity action, then his consent would not have been required pursuant to R.C. 3107.07(B)(1), as a matter of law.

There must be strict compliance with the statutory requirements, so that the adoption process fulfills its intended goal of protecting the best interests of the child. Adoption is a process that needs procedures to ensure that the child will be provided with a

permanent and stable home. In the State of Ohio, the procedure relating to a putative father is clear and Appellee only preserved a right to be heard in this matter by registering as a putative father.

The law requires strict adherence to the adoption statutes. Adoption statutes are in derogation of common law and therefore must be strictly construed. The integrity of the statutory process is an absolute necessity. See *Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258, 452 N.E.2d 1304. "While strict adherence to the procedural mandates of R.C. 3107.07(B) might appear unfair in a given case, the state's interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously justifies such a rigid application. See *Lehr*, 463 U.S. at 265, 103 S. Ct. at 2995, 77 L. Ed. 2d at 629." *In re Adoption of Zschach* (1996), 75 Ohio St. 3d 648, 665 N.E.2d 1070, 1074.

The decision of the Probate Court is in direct conflict with the case of *In the Matter of Adoption of Baby Boy Brooks* (2000), 136 Ohio App. 3d 824, 737 N.E. 2d 1062. In *Brooks*, the Court applied the statutory definition of "putative father" and found that the birth-father in that case was no longer a putative father because he established paternity "prior" to the filing of the petition to adopt. Applying *Brooks* to the present case, the facts are exactly the opposite, but the law and the required statutory construction are exactly the same. The Court in *Brooks* noted that "in any case of statutory construction, the paramount goal is to ascertain and give effect to the legislature's intent in enacting the statute. . . . In so doing, however, the court must first look to the plain language of the statute itself to determine the legislative intent. . . .

Under Ohio law, it is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. . . . Thus, if the language used in a statute is clear and unambiguous, the statute must be applied as written and no further interpretation is necessary. . . . It is only where the words of a statute are ambiguous, uncertain in meaning, or conflicting that a court has the right to interpret a statute. *Id.* at 828-829 (*citations omitted*) R.C. 3107.01(H)(3) is clear and unambiguous. If paternity was not established "***prior*** to the date a petition to adopt the child was filed," then he is a putative father. The word "***prior***" in R.C. 3107.01(H)(3) can have no other meaning. Appellee is a putative father in this adoption proceeding and R.C. 3107.07(B), not R.C. 3107.07(A), applies.

The Court in *Brooks* also gave a summary of the legislative history and the legislative intent of the Putative Father Registry. An exception to the requirement of registration within thirty days was removed from the final version of the bill. It was noted that "[g]iven that the legislature did not intend for there to be any exceptions to the registration requirement, that the purpose of the adoption laws is to provide children with a stable home in an expeditious manner, and that adoption laws are to be strictly construed, I conclude that the General Assembly intended in *R.C. 3107.07(B)(1)* to eliminate the necessity of a putative father's consent to an adoption if he fails to register with the putative father registry within thirty days of the child's birth." *Id.* at 834. In the present case, Appellee is a registered putative father and can only participate in the adoption proceeding as a putative father. The failure of the Probate Court to acknowledge that Appellee

must remain a putative father in the adoption proceeding creates an impermissible exception to the Registry, which will render the entire statutory scheme set forth in the Ohio Revised Code as meaningless.

The Supreme Court of the United States has acknowledged and accepted the legal basis and the constitutionality of the putative father registry in *Lehr v. Robertson* (1983), 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614. In *Lehr*, the U.S. Supreme Court rejected a due process challenge to the New York putative father registry that required notice of an adoption petition to a putative father only if the putative father fell into one of seven categories, which included putative fathers who had registered with New York's adoption registry. The Supreme Court concluded that the statutory scheme adequately protected a putative father's opportunity to establish a relationship with his child. The Supreme Court rejected the putative father's claim that, even if the statutory scheme adequately protected a putative father's opportunity to establish a relationship with his child in the "normal case," he was nonetheless entitled to "special notice" because the trial court and birth-mother "knew that he had filed an affiliation proceeding in another court." *Id. at* 264-265. The Court stated:

> [t]his argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute. The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's

> determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his constitutional rights were offended because the Family Court strictly complied with the notice provisions of the statute. *Id.* at 265.

By allowing Appellee to change his status in the adoption proceeding, the Probate Court has allowed an indirect and impermissible attack against the Ohio Putative Father Registry that the Supreme Court did not allow in *Lehr*. Appellee must be considered as only the putative father in the adoption proceeding pursuant to the clear requirements under the law. If he is not considered as a putative father in this proceeding, then the Ohio Putative Father Registry has no meaning.

The State of Ohio, like many other states, has established a statutory scheme to balance the rights of the child, the adoptive parents, the mother, and the putative father. If the decision of the Probate Court is not reversed, the entire statutory scheme that includes the Putative Father Registry will become meaningless. The decision of the Probate Court creates an exception to the requirements of the Registry. Once one exception is created, there can be no further reliance on the Registry and the entire process falls apart. The decision of the Probate Court is in clear contradiction

of the intent of the Registry and of the clear and unambiguous statutory language set forth in R.C. 3107.01(H)(3). If this decision is not reversed, there will an exception to the Registry requirement created and the Registry and associated statutory scheme will be meaningless. The clear requirements of the law must be followed and the decision must be reversed to maintain the integrity of the adoption process.

Appellants' Second Assignment of Error

The Probate Court erred in finding that it did not have exclusive jurisdiction over the adoption proceeding.

Issue presented for review and argument

Under Ohio law, the Probate Court has original and exclusive jurisdiction over adoption proceedings and any proceeding in another court that does not affect the substantive issues of the adoption is not relevant.

It is well established that the Probate Court has original and exclusive jurisdiction over any adoption filed in its court. The Ohio Supreme Court has held that "original and exclusive jurisdiction over adoption proceedings is vested specifically in the Probate Court pursuant to R.C. Chapter 3107" *State ex rel. Portage Co. Welfare Dept. v. Summers* (1974), 38 Ohio St. 2d 144, 151. It has also long been established that adoption "embraces not only custody and support but also descent and inheritance and in fact every legal right with respect to the child." *In re Adoption of Biddle* (1958), 168 Ohio St. 209, 214. On January 16, 2008, the exclusive jurisdiction over the adoption of

Grayson by Appellants became vested in the Lucas County Probate Court.

All other pending cases are not relevant to the adoption proceeding, unless such pending case directly relates to a substantive issue in the adoption proceeding. In this adoption proceeding, the allegation is that the consent of Appellee is not required pursuant to R. C. 3107.07(B), because he is a putative father that failed to meet his obligations as a putative father. The paternity case has no legal effect upon this adoption proceeding. In fact, the allegation that the consent of Appellee is not required because he is not the biological father was withdrawn long before paternity was established. (T.d. 47)

The Probate Court's confusion and error in this case is mainly attributed to its misinterpretation and misapplication of the case of *In re Adoption of Pushcar* (2006), 110 Ohio St. 3d 332. *Pushcar* involved a step-parent adoption where the Probate Court found that the consent of father was not required pursuant to R.C. 3107.07(A), based upon his failure to communicate with the child for a one year period. The father was named on the birth certificate, but had not yet established paternity. (This aspect of Ohio law changed in 2001. The putative father can now only be named on the birth certificate if the Affidavit of Paternity is executed by mother and putative father, which establishes paternity.) The Appellate Court in *Pushcar* held that the Probate Court could not allow the adoption to proceed under R.C. 3107.07(A) because there had been no judicial determination of paternity. The Supreme Court affirmed and held that, in such circumstances, the Probate Court must defer to the Juvenile Court and refrain from addressing the matter

until adjudication in the Juvenile Court. *Pushcar* has never had any application to this adoption proceeding. *Pushcar* is only applicable to R.C. 3107.07(A) cases, and has no application to R.C. 3107.07(B) cases. The entire basis of the decision in *Pushcar* was that the requisite one-year statute for failure to communication did not begin to run until the date of the establishment of paternity. The one-year statute and *Pushcar* do not apply to this case. The establishment of paternity is not relevant in the present case. Appellee is a putative father in this adoption proceeding and his consent is not required pursuant to R.C. 3107.07(B), and not pursuant to R.C. 3107.07(A) as in *Pushcar*.

A pending case may be considered relevant to the adoption proceeding if it directly relates to a substantive issue in the adoption proceeding. To hold otherwise is a failure to acknowledge the original and exclusive jurisdiction of the Probate Court. If the allegation is that a parent's consent is not required pursuant to R.C. 3107.07(A) because that parent failed to communicate or support for the one-year period, a paternity action that establishes the starting point for the one-year period may be relevant. However, a paternity action has no relevance to the allegations relating to a putative father pursuant to R.C. 3107.07(B). *In re Adoption of Sunderhaus* (1992), 63 Ohio St. 3d 127, 585 N.E.2d 418 was also cited. *Sunderhaus* is no different than *Pushcar* and likewise does not apply to this adoption proceeding. *Sunderhaus* was also a R.C. 3107.07(A) case. The holding in *Sunderhaus* was "the one-year period of nonsupport prescribed by *R.C. 3107.07(A)* which obviates the requirement to obtain parental consent to an adoption pursuant to *R.C. 3107.06* commences on the date that parentage has been judicially

established." *Id.* at 132. The Court stated that "[t]he ability to dispense with the consent requirement under *R.C. 3107.07(A)* is dependent upon two factors: (1) the establishment of the parent-child relationship, and (2) the failure to satisfy the support obligation arising therefrom." *Id.* at 130. The Court also noted the distinction between the parental consent and the putative father. *Sunderhaus* does not apply to putative fathers and does not apply to this adoption proceeding.

This Court in the case of *In re Adoption of Joshua Tai T.* (June 2, 2008), 2008 Ohio 2733 distinguished *Pushcar* as follows:

> Appellant has argued that the trial court was required to refrain from consideration of the adoption petition under the Ohio Supreme. Court's decision of *In re Adoption of Pushcar, 110 Ohio. St.3d 332, 2006 Ohio 4572, 853 N.E.2d 647.*
>
> The trial court overruled the motion and held that the decision of *In re Adoption of Pushcar* was distinguishable. We agree. In *Pushcar,* the issue of paternity of the child was pending in juvenile court at the time the petition for adoption was filed in probate court. The *Pushcar* court recognized that establishing paternity was a necessary element of the petitioner's case for adoption as the adoption in the case was being sought without the consent of the father under *R.C. 3107.07(A). Id., P 13.* The court reasoned that establishing paternity was a necessary element of petitioner's case for adoption. In view of that fact, the probate court should have deferred proceeding on the

> adoption until the juvenile court had adjudicated paternity. Here, however, paternity is not disputed and the juvenile court's involvement in prior proceedings was limited to continuing jurisdiction over custody.
>
> In *Pushcar,* the Ohio Supreme Court reaffirmed that original and exclusive jurisdiction over adoptions in Ohio is vested in probate court. *Id., P 9.* Furthermore, probate courts have jurisdiction to proceed with adoptions even where the involved child is subject to custody orders within the continuing jurisdiction of domestic relations or juvenile courts. . . . Accordingly, appellant's argument that the trial court should have deferred proceeding with the adoption due to the pending jurisdiction of juvenile court over custody of Joshua is without merit. *Id.* at 13-14.

In re Adoption of Joshua Tai T. is directly on point with the present case. The allegation in this adoption proceeding is that the consent of the putative father is not required pursuant to R.C. 3107.07(B). The Juvenile Court case did not bar the Probate Court from proceeding with the adoption. The Probate Court has original and exclusive jurisdiction over this adoption. The establishment of paternity in the Juvenile Court case was not a "necessary element" of the Petitioners' case in this adoption proceeding. The establishment of paternity is not a "necessary element" and is not relevant in this adoption proceeding. The Eight Appellate District in *In re T.N.W.* (March 13, 2008), 2008 Ohio 1088 also found *Pushcar* to be inapplicable. The Court rejected the argument that the adoption should have been enjoined from proceeding and held

that "a ruling from the juvenile court on the issue of parentage was not needed to proceed with the adoptions." *Id.* at 7.

The goal is not to create a race to the courthouse and circumvent the public policy of providing stability and certainty in the adoption process, thus discouraging adoptive parents from forming emotional bonds with children they could lose during the adoption process. A putative father has a duty to support the birth-mother during her pregnancy and, if he does not, his consent is not required under R.C. 3107.07(B)(2)(c). The putative father has a duty to support the child. See R.C. 3107.07(B)(2)(b); *In re Adoption of Bowes* (1995), 105 Ohio App. 3d 574; 664 N.E.2d 963; *In re Adoption of Strawser* (1987), 36 Ohio App. 3d 232, 522 N.E.2d 1105. Ohio has a statutory process that addresses the rights of the parties and the procedures to follow in an adoption. Permanent custody of the child was obtained by the Agency on November 4, 2007 pursuant to R.C. 5103.15(B)(2) and R.C. 2151.011(B)(30). The adoptive placement was made on November 4, 2007 and the ICPC approval was obtained on November 8, 2007, which was all pursuant to the statutory adoption process set forth in the Ohio Revised Code. The paternity action is not part of the statutory adoption process that involves the adoptive placement of this child when he was a newborn. The decision of the Probate Court disrupts and circumvents the statutory adoption process and the decision must be reversed.

In further support of the Probate Court's exclusive jurisdiction over this adoption is the fact that the R.C. 3127.23 Affidavit does not apply to this adoption proceeding. Ohio probate courts have required the

filing of this Affidavit in adoption proceedings for years, which requires disclosure of other pending cases. The former Ohio code section is R.C. 3109.27, which was part of the Uniform Child Custody Jurisdiction Act ("UCCJA"). In 2005, Ohio passed the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which superseded the UCCJA. The Ohio code section for the Affidavit is now R.C. 3127.23. Where the UCCJA was not clear as to its applicability to adoption proceedings, the UCCJEA is now very clear. R.C. 3127.02 states that UCCJEA provisions do not govern adoption proceedings. Therefore, other proceedings are not relevant if such proceedings do not affect the substantive issues in the adoption.

The decision of the Probate Court to dismiss the adoption is based on a finding by the Probate Court that Appellee may change his status from a "putative father" to a "father" inside the adoption proceeding. This is contrary to the original and exclusive jurisdiction of the Probate Court over adoption proceedings. If this decision is not reversed, the jurisdiction of the Probate Court over any and all adoption proceedings will be questionable. The decision must be reversed to maintain the integrity of the Probate Court and of the adoption process.

Appellants' Third Assignment of Error

The Probate Court erred by allowing Appellee to be a party to the adoption proceeding.

Issue presented for review and argument

Under Ohio law, there is no requirement to search the putative father registry if there is a legal father.

It is undisputed that Jovan Bocvarov signed his permanent surrender as the legal father. Pursuant to R.C. 3111.03(A)(1), Jovan Bocvarov was presumed to be the father of this child and was the legal father of this child when he signed his surrender. In the context of this adoption proceeding, Appellee, as a putative father, has no standing and no right to be a party in the adoption proceeding. On the date the Petition for Adoption was filed, the presumption that Jovan Bocvarov is the father of this child had not been rebutted and no other person had established paternity. The presumption of paternity under R.C. 3111.03(A)(1) was required to be rebutted ***prior*** to the filing date of the petition. In the context of this adoption proceeding, the time in which the presumption of paternity under R.C. 3111.03(A) could be rebutted had passed. The legal father of the child is Jovan Bocvarov and that fact cannot be changed in this adoption proceeding.

In the present case, permanent surrenders have been executed by both legal parents. (T.d 2) The consents of the parents are not required in this proceeding pursuant to R.C. 3107.07(C). In other cases, the putative father can obtain the right to receive notice of an adoption proceeding by timely registering with the Putative Father Registry. However, the Putative Father Registry is not relevant to this proceeding. R.C. 3107.064 provides, in pertinent part, as follows:

§3107.064 Filing of certified results of search required; exceptions.

(A) Except as provided in division (B) of this section, a court shall not issue a final decree of adoption . . . unless . . . the agency or attorney arranging the adoption files with the court a certified document provided by the department of job and family services under section 3107.063 [3107.06.3] of the Revised Code. . . .

(B) The document described in division (A) of this section is not required if any of the following apply:

(1) The mother was married at the time the minor was conceived or born; . . .

Consistent with R.C. 3107.064(B)(1), a private child placing agency (PCPA) is not required to search the Ohio Putative Father Registry (OPFR) under the regulations set forth in the Ohio Administrative Code in certain cases. OAC 5101:2-48-02 provides, in pertinent part, as follows:

5101:2-48-02 Putative father registry.

. . . (E) The PCSA or PCPA is not required to search the OPFR for court proceedings on adoption of a child when:

(1) The mother was married at the time the child was born or conceived. . . .

Pursuant to R.C. 3107.064(B)(1) and OAC 5101:2-48-02(E)(1), a search of the Registry was not required

in this case because there was already a legal father, Jovan Bocvarov. In the State of Ohio, the only way for a putative father to be entitled to receive notice of an adoption proceeding is to timely register with the Ohio Putative Father Registry. There is no other filing, procedure, or way for the putative father to assert his rights in an adoption proceeding in Ohio. However, R.C. 3107.064(B)(1) is very clear that the search of the Registry is not required in this case. If the only way a putative father is entitled to receive notice of this adoption proceeding is to timely register with the Putative Father Registry, and if there is no requirement in this case to search the Registry, then the putative father lacks any standing to file an objection in this adoption proceeding and the putative father is not a party to this adoption proceeding. Pursuant to R.C. 3107.15, any and all rights of any and all biological or other legal parents are terminated by the final decree of adoption. Any and all inchoate rights of the putative father relating to this child will terminate with the final decree of adoption. Since the putative father has no standing to participate in this proceeding, he is not entitled to notice of these proceedings. These proceedings are confidential pursuant to the confidentiality provisions set forth in R.C. 3107.17. Any information relating to this adoption is not to be disclosed to any party without standing. Since the putative father has no standing to be a party to this proceeding, any disclosure of any information relating to this proceeding to the putative father would be a violation of R.C. 3107.17(B)(1).

A finding that Ohio law allows no standing to this putative father is supported by the Supreme Court case of *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333. In *Michael H.*, the

Supreme Court found no issue with the California law that made no provision for dual fatherhood. Likewise, Ohio law makes the presumption that the man married to a woman at the time of birth or conception is the father. The Fifth Amendment to the U.S. Constitution contains the Double Jeopardy Clause, which provides that "[n]o person shall . . .be twice put in jeopardy of life or limb." Requiring adoptive parents to seek the consent of multiple classifications of fathers is a violation of the Fifth Amendment. This clearly puts the adoptive parents and the adoptive child in jeopardy of emotional and mental harm by breaking a permanent and stable home and a emotional parent child relationship. It is also a due process violation to require adoptive parents to secure the surrenders or consents of multiple legal fathers at different points in time, while simultaneously providing for the emotional and financial support of the child.

Appellants' Fourth Assignment of Error

The Probate Court erred by refusing to consider all allegations set forth in the Petition that were stated as separate grounds for finding the consent of the putative father is not required.

Issue presented for review and argument

The due process rights of Appellants were violated when the Probate Court failed to even consider the separately stated grounds set forth in the Petition.

In their Petition, Appellants alleged that the consent of Appellee is not required based on any of the

following: a) the husband of the birth-mother is the presumed legal father pursuant to R.C. 3111.03(A)(1) and the putative father has no standing in this adoption proceeding and is not entitled to any notice of this adoption proceeding; . . . c) the putative father has willfully abandoned or failed to care for and support the minor; d) the putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner; e) R.C. 3107.06(C), which states that "Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:...(C) The putative father of the minor; ..." is unconstitutional . . .; f) the biological parent must have legal custody of the minor to have any rights and the putative father, by definition, cannot have legal custody and therefore has no rights; g) the adoption is in the best interest of the child. The allegation of "b) the putative father is not the father of the minor" was withdrawn on September 15, 2008. (T.d 47) However, all other allegations remained and the Probate Court failed to even address the allegations. The establishment of paternity was not relevant to any of the remaining allegations. This is, at the very least, a due process violation, which is a right guaranteed by the 14th Amendment to the U.S. Constitution.

IV. CONCLUSION

For any and all of the reasons set forth above and in the record, Appellants respectfully request that this Court REVERSE the decision of the Probate Court, and ENTER a finding that Benjamin Wyrembek is a

putative father in the adoption proceeding, and REMAND the matter to the Probate Court for further proceedings.

Respectfully submitted,

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[*Certificate of Service omitted in printing of this appendix*]

* * *

[*Exhibit A, Judgment Entry, dated June 4, 2009, is reproduced in this appendix at Appendix H 46a - 53a*]

* * *

APPENDIX J

IN THE SUPREME COURT OF OHIO

Case No. 09-2355

[Filed December 30, 2009]

Adoption of : G.V.,	)
	)
Jason and Christy Vaughn,	)
	)
Appellants,	)
	)
Benjamin Wyrembek,	)
	)
Appellee.	)
	)

On Appeal from the Lucas County Court of Appeals, Sixth Appellate District

Court of Appeals
Case No. L-09-1160
(Entry Date: November 30, 2009)

Trial Court No. 2008 ADP 000010
Lucas County Probate Court

NOTICE OF APPEAL OF APPELLANTS JASON AND CHRISTY VAUGHN

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Notice of Appeal of Appellants Jason and Christy Vaughn

Appellants Jason and Christy Vaughn hereby give notice of appeal to the Supreme Court of Ohio from the Decision of the Lucas County Court of Appeals, Sixth Appellate District of Ohio, entered on November 30, 2009 in the case captioned *In re Adoption of G.V.*, Lucas County Court of Appeals Case No. L-09-1160. This appeal involves the adoption of a minor child.

This appeal involves substantial constitutional questions and involves a case of public or great general interest, as set forth more fully in the Memorandum in Support of Jurisdiction of Appellants Jason and Christy Vaughn, which is being filed herewith. Pursuant to S. Ct. Prac. R. II, Section 1(A)(2), this appeal is taken as a claimed appeal of right based on the substantial constitutional questions involved in

this case. Pursuant to S. Ct. Prac. R. II, Section 1(A)(3), this appeal is also taken as a discretionary appeal because it is a case of public or great general interest. The Decision entered by the Court of Appeals on November 30, 2009 in this case is attached hereto.

Respectfully submitted,

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[*Certificate of Service omitted in printing of this appendix*]

* * *

[*Attachment 1, Decision and Judgment, dated November 30, 2009, is reproduced in this appendix at Appendix B 20a - 29a*]

* * *

[*Attachment 2, Judgment Entry, dated June 4, 2009, is reproduced in this appendix at Appendix H 46a - 53a*]

* * *

APPENDIX K

IN THE SUPREME COURT OF OHIO

Supreme Court Case No. 09-2355

[Filed March 23, 2010]

Adoption of : G.V.,	)
	)
Jason and Christy Vaughn,	)
	)
Appellants,	)
	)
Benjamin Wyrembek,	)
	)
Appellee.	)
	)

On Appeal from the Lucas County Court of Appeals, Sixth Appellate District

Court of Appeals
Case No. L-09-1160
(Entry Date: November 30, 2009)

Trial Court No. 2008 ADP 000010
Lucas County Probate Court

MERIT BRIEF OF APPELLANTS JASON AND CHRISTY VAUGHN

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Statement of Facts

This case involves the adoption of a child by the Appellants, Jason and Christy Vaughn, and the objection to the adoption by the putative father. The child was born on October 29, 2007 at St. Luke Hospital in Lucas County, Ohio. The birth-mother of the child is Drucilla Bocvarov. On November 1, 2007, Drucilla Bocvarov executed her Permanent Surrender in accordance with R.C. 5103.15 and requested Adoption By Gentle Care (the "Agency") to take permanent custody of the child. On November 4, 2007, Jovan Bocvarov, the legal father of the child, executed his Permanent Surrender in accordance with R.C. 5103.15 and requested the Agency to take permanent custody of the child. The Agency is a duly licensed private child placing agency, as defined in R.C. 2151.011(A)(3), located at 380½ E. Town Street, Columbus, Ohio 43215 in Franklin County, Ohio. The Agency accepted the permanent custody of the child on November 4, 2007 and placed the child in an adoptive placement with Appellants. The placement received ICPC (Interstate Compact on the Placement of Children) approval on November 8, 2007. The child has resided in the home of Appellants in a supervised adoptive placement since the ICPC approval date of November 8, 2007. On November 15, 2007, Appellee registered with the Ohio Putative Father Registry. On January 16, 2008, Appellants filed a Petition for Adoption in the Lucas County Probate Court. On February 21, 2008, the filing that was previously filed by Appellee in the Fulton County Juvenile Court was transferred to the Lucas County Juvenile Court. On May 19, 2008, the Lucas County Probate Court wrongfully stayed the adoption proceedings. On February 27, 2009, Appellants conditionally agreed to

DNA testing based upon this Supreme Court's ruling in *State ex rel. Furnas v. Monnin* (2008), 120 Ohio St. 3d 279, 2008 Ohio 5569, 893 N.E. 2d 573. On March 17, 2009, the Lucas County Juvenile Court entered a finding that Appellee is the biological father and dismissed the entire proceeding in the Juvenile Court due to the pending adoption. On June 4, 2009, the Probate Court misinterpreted and misapplied the case of *In re Adoption of Pushcar* (2006), 110 Ohio St. 3d 332, 2006 Ohio 4572, 853 N.E.2d 647 and dismissed the Petition for Adoption. On November 30, 2009, the Sixth District also misinterpreted and misapplied *Pushcar* and wrongfully affirmed the decision of the Probate Court.

Argument

Proposition of Law No. I:

The Ohio Revised Code sets forth a statutory scheme for adoption proceedings, which includes the Putative Father Registry and the definition of a putative father.

The statutory provisions set forth in the Ohio Revised Code relating to the parties involved in an adoption proceeding are clear and constitutional. The due process rights of a putative father are statutorily protected. Many states have enacted a putative father registry or other legislative provisions to address the rights of the parties in adoption proceedings. The use of putative fathers registries to facilitate early permanency for children is consistent with the stated national child welfare policy that views adoption as an option for providing such permanency. There has been much concern in recent years with providing children

with stable, permanent homes. The Ohio legislature has moved by mandating prompt permanency for children in public agency custody and by allowing easier involuntary termination of the rights of abandoning birth-parents in private adoptions. Since 1997, the proper application of the Ohio Putative Father Registry has been instrumental in providing early permanency for a countless number of children.

The putative father registry represents a legislative balancing of the rights of the putative father against the rights of the child. For the court to disturb the balance struck by the legislature denies the child an opportunity to have his or her best interests considered and reduces the child to a mere chattel. The child's right to permanency must be balanced against the rights of a birth-father that has allegedly abandoned both the birth-mother and the child. The Ohio Revised Code sets forth the right to allege the abandonment by the birth-father in R.C. 3107.07(B)(2). A court system that would not allow the statutory abandonment allegations to even be presented would delay permanency and would certainly be contrary to the child's best interest. Clearly, this is not a direction in which the court system should be moving.

This Supreme Court has stated that the ultimate goal in the adoption process is to protect the best interests of children and ensuring that the adoption process is completed in an expeditious manner. See *In re Adoption of Zschach* (1996), 75 Ohio St. 3d 648, 665 N.E.2d 1070; *In re Adoption of Ridenour* (1991), 61 Ohio St. 3d 319, 574 N.E.2d 1055. The Ohio Revised Code, which includes the provisions relating to a putative father, sets forth a statutory scheme in which an adoption may be completed in an expeditious

manner. When the statutory adoption process is not followed, the entire matter becomes convoluted with inappropriate stays, irrelevant proceedings in court without jurisdiction, and protracted litigation. If the statutory adoption process is followed, then this Supreme Court's stated goal of completing the process in an expeditious manner will be met.

The United States Supreme Court acknowledged and accepted the legal basis and the constitutionality of the putative father registry in *Lehr v. Robertson* (1983), 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985. In *Lehr*, the Supreme Court rejected the putative father's claim that, even if the statutory scheme adequately protected a putative father's opportunity to establish a relationship with his child in the "normal case," he was nonetheless entitled to "special notice" because the trial court and the birth-mother knew that he had filed an affiliation proceeding in another court. In rejecting this argument, the Supreme Court stated:

> [t]his argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute. The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's

> inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his constitutional rights were offended because the Family Court strictly complied with the notice provisions of the statute.
>
> *Lehr*, 463 U.S. at 265.

The ignoring of the clear statutory language relating to an adoption proceeding, the staying of an adoption proceeding to allow the establishment of paternity after the adoption petition is filed, and the allowing of the birth-father to retroactively change his status within the adoption proceeding, is "nothing more than an indirect attack" on the adoption process set forth in the provisions of the Ohio Revised Code. This is exactly what the U.S. Supreme Court would not permit in *Lehr*. "The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously, which underlie the entire statutory scheme, justifies the requirement that the court adhere precisely to the procedural requirements of the Ohio statutes.

The rights of a putative father in the adoption process gained national attention after the U.S. Supreme Court addressed certain due process issues in *Stanley v. Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208. The U.S. Supreme Court subsequently addressed putative father issues in the following cases: *Quilloin v. Walcott* (1978), 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549; *Caban v. Mohammed* (1979), 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760; *Lehr v. Robertson;* and *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333. From these cases, a distinction can be

drawn between a "developed parent-child relationship," which was implicated in *Stanley* and *Caban*, and the "potential relationship" involved in *Quilloin* and *Lehr*. The common factor in the holdings from these cases is that a putative father must have a developed relationship with his biological child to be entitled to due process protection. However, factoring in *Michael H.*, that understanding of the putative father's rights is debatable, as the putative father in *Michael H.* did not receive any favored status even after maintaining a substantial relationship with his child. The Court in *Michael H.* found that any claimed rights of the putative father must succumb to the rights of the marital family. In the present case, Appellee has never had a substantial relationship with the child and the martial unit, the birth-mother and the legal father, decided to place the child for adoption. Nevertheless, the statutory provisions of the Ohio Revised Code protected his due process rights.

To provide clarity and integrity to the adoption process, to balance the rights of all parties in the adoption process, and to protect the best interests of the children, state legislatures have enacted statutory schemes to address these issues. The true purpose of all of these statutory schemes, including the states that include a putative father registry, is to expeditiously secure the permanency for the child. The putative father must take some responsibility to even become a party in the adoption process. If he fails to timely register, or whatever the state statute requires, the putative father has failed to demonstrate his interest. If he does register, or otherwise secures his right to be heard pursuant to the state statute, there may be additional requirements that the state may impose relating to the putative father's full

commitment. The Ohio Putative Father Registry has been in effect since January 1, 1997. The Ohio legislature decided that the putative father is entitled to notice if he timely registers, but his consent may not be required if he abandons the birth-mother during pregnancy or if he abandons the child. This is the statutory scheme enacted by the Ohio legislature. This is the statutory scheme that must be followed in adoption proceedings in all Ohio courts.

Children should be recognized as individuals possessed of their own interests and rights, including the right to be part of a stable and permanent family, and the right to remain part of that family once it is established, with an expectation that the status will be permanent. These rights are constitutionally founded and are at the core of all liberties. The child's inalienable right to life and liberty in the family context must be protected. These constitutional interests are both procedural and substantive. Therefore, they should not be disturbed absent a compelling, established competing interest that is entitled to constitutional protection. Even then, if the constitutionally protected interests are in conflict and evenly balanced, the conflict should be resolved in favor of the child. In the present case, the lower courts failed to even consider the rights of any other party other than the putative father.

Courts have increasingly recognized that children have rights under the United States Constitution, and it is unreasonable to remedy any purported breach of a biological parent's rights by curtailing the fundamental rights of the child. In the present case, the child has been in a proper legal adoptive placement since November 2007. The delays in this litigated

matter have been caused by the failure to follow the clear statutory adoption process. These delays have resulted in the child becoming fully integrated as a family member in the prospective adoptive family. The rights of the child must be addressed and protected. The lower courts in the present case failed to follow the statutory adoption process and failed to even consider the rights of the child. Again, only the rights of the birth-father were considered, which has created an equal protection issue under the 14th Amendment. A proper application of the relevant statutory provisions will ensure that the rights of all parties in Ohio adoption proceedings, most importantly the child's rights, are addressed.

It has long been recognized that children are persons with rights protected by the United States Constitution. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Mo. v. Danforth* (1976), 428 U.S. 52, 74, 49 L. Ed. 2d 788, 96 S. Ct. 2831. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault* (1967), 387 U.S. 1, 13, 18 L. Ed. 2d 527, 87 S. Ct. 1428. By not following the statutory adoption process, the rights and best interests of the child are being ignored.

In the present case, the lower courts disregarded the statutory adoption process and did not allow Appellants to present any evidence as to the allegation that Appellee abandoned both the birth-mother and the child. The lower courts have elevated the rights of the birth-father above the rights of all other parties in

the adoption proceeding. This has created an imbalance in the adoption process, which is in contradiction to the balance created by the Ohio legislature. If the statutory adoption process is followed, the rights of all parties can be addressed. If the process is not followed, the whole system breaks down with lengthy delays occurring and additional issues arising. For the protection of the rights of all parties involved, most importantly the rights of the child, this case must be reversed by this Supreme Court or there will be an imbalance and uncertainty in all Ohio adoptions involving a putative father.

The decision of November 30, 2009 by the Court of Appeals is contrary to the clear adoption process set forth in the Ohio Revised Code, is contrary to other case law, and effectively destroys the Ohio Putative Father Registry. The Ohio Revised Code clearly defines how adoption matters are administered. The Ohio General Assembly took great care in developing these statutory provisions. If the birth-mother is unmarried, then she is the sole residential parent and legal custodian of the child pursuant to R.C. 3109.042. If the birth-mother was married at the time of conception, then her husband is presumed to be the father pursuant to R.C. 3111.03(A)(1). Either way, Appellee is not a legal father, rather he is a putative father as statutorily defined.

A putative father is defined by R.C. 3107.01(H) as a man who may be a child's father and to whom all the following apply: 1) he is not married to the mother; 2) he has not adopted the child; 3) he has not been ***DETERMINED PRIOR*** to the date a petition to adopt the child is filed to have a parent child relationship (paternity established); and 4) there was no

acknowledgement of paternity signed by the birth-mother and the birth-father. It must be acknowledged that the General Assembly understands the meaning of words. There can be no other meaning for the words "determined" or "prior." R.C. 3107.01(H)(3) does ***NOT*** say that the paternity action must be "***FILED***" before the petition for adoption. It says that the parent child relationship must be "***DETERMINED PRIOR***" to the filing of the petition for adoption. In this case, paternity was not established prior to the filing of the petition for adoption. The General Assembly meant no other definition of a putative father. The General Assembly enacted no statute to change the status of a putative father during the adoption process. The definition of a putative father in R.C. 3107.01(H)(3) was not addressed by the Appellate Court.

"[I]n any case of statutory construction, the paramount goal is to ascertain and give effect to the legislature's intent in enacting the statute. . . . In so doing, however, the court must first look to the plain language of the statute itself to determine the legislative intent. . . . Under Ohio law, it is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. . . . Thus, if the language used in a statute is clear and unambiguous, the statute must be applied as written and no further interpretation is necessary. . . . It is only where the words of a statute are ambiguous, uncertain in meaning, or conflicting that a court has the right to interpret a statute." *In re Adoption of Baby Boy Brooks* (2000), 136 Ohio App. 3d 824, 828-829, 737 N.E.2d 1062 (*citations omitted*). The statutory language set forth in R.C. 3107.01(H)(3) is clear and unambiguous.

The law requires strict adherence to the adoption statutes. Adoption statutes are in derogation of common law and therefore must be strictly construed. The integrity of the statutory process is an absolute necessity. See *Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258, 452 N.E.2d 1304. "While strict adherence to the procedural mandates of R.C. 3107.07(B) might appear unfair in a given case, the state's interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously justifies such a rigid application. See *Lehr,* 463 U.S. at 265, 103 S. Ct. at 2995, 77 L. Ed. 2d at 629." *Zschach* at 665 N.E.2d at 1074. In the present case, strict adherence to the procedural mandates would have resolved this adoption expeditiously and would have been abundantly fair.

The putative father registry is an integral part of the adoption statutes. The putative father registry is constitutional and does not violate Appellee's rights. Appellee timely registered, he was notified of the adoption, and his consent may or may not be required. A putative father's consent is required if he has met the criteria for maintenance and support of the child and the birth-mother. If he does not meet that criteria, then his consent is not required. A putative father is held to a different standard than a legal father and that is constitutional. The U.S. Supreme Court has stated that "the mere existence of a biological link does not merit equivalent constitutional protection." *Lehr*, 463 U.S. at 261. In fact, at the onset of its opinion in *Lehr*, the Supreme Court noted that it "disagreed" with Lehr's assertion that *Stanley v. Illinois* and *Caban v. Mohammed* "gave him an absolute right to notice and an opportunity to be heard before the child may be adopted." *Lehr*, 463 U.S. at 250. The Court in

Lehr made it clear that there are no absolute rights for putative fathers, when it cited with approval the dissent of Justice Stewart in *Caban* as follows:

> Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, ... it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.
>
> *Lehr*, 463 U.S. at 260.

A change of status from a putative father to a legal father is in direct contradiction to the process outlined by the General Assembly and there is no case law that supports such an impermissible exception to the statutory provisions.

The procedural steps set forth in the Ohio Revised Code that were followed in this adoption proceeding were as follows:

1. Placement: Pursuant to R.C. 5103.15, both legal parents executed permanent surrenders and the child was placed into the permanent custody of the Ohio agency. The putative father is not involved in the placement process. Only "parent" or "parents" are involved in the placement. The putative father is not a "parent" and is defined in R.C. 3107.01(H). If "putative father" and "parent" were the same thing, there would be no separate and distinct definition and provisions in the Ohio Revised Code relating just to the putative father.

2. ICPC: Pursuant to R.C. 5103.23, the Ohio agency placed the child with Appellants, who reside in Indiana, by obtaining the approval of the ICPC offices in Ohio and Indiana. Again, the putative father is not involved in the interstate placement approval process.

3. Petition: With the child legally placed with them in their Indiana home, Appellants could then proceed with the filing of the adoption petition. Pursuant to R.C. 3107.04(A), the petition was filed in the Probate Court in Lucas County, Ohio, which is the county where the child was born. It was at this point in the adoption process that the putative father first became relevant and first needed to be considered. R.C. 3107.06 list the parties, if relevant to the adoption, whose consent is required, as follows:

> § 3107.06. Who must consent
>
> Unless consent is not required under *section 3107.07 of the Revised Code*, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:
>
> (A) The mother of the minor;
>
> (B) The father of the minor, if any of the following apply:
>
> (1) The minor was conceived or born while the father was married to the mother;
>
> (2) The minor is his child by adoption;

(3) Prior to the date the petition was filed, it was determined by a court proceeding pursuant to *sections 3111.01* to *3111.18 of the Revised Code*, a court proceeding in another state, an administrative proceeding pursuant to *sections 3111.38* to *3111.54 of the Revised Code*, or an administrative proceeding in another state that he has a parent and child relationship with the minor;

(4) He acknowledged paternity of the child and that acknowledgment has become final pursuant to *section 2151.232 [2151.23.2]*, *3111.25*, or *3111.821 [3111.82.1] of the Revised Code*.

(C) The putative father of the minor;

(D) Any person or agency having permanent custody of the minor or authorized by court order to consent;

(E) The minor, if more than twelve years of age, unless the court, finding that it is in the best interest of the minor, determines that the minor's consent is not required.

R.C. 3107.07 lists the exceptions to the consent requirements, as follows:

§ 3107.07. Who need not consent

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

(B) The putative father of a minor if either of the following applies:

(1) The putative father fails to register as the minor's putative father with the putative father registry established under *section 3107.062 [3107.06.2] of the Revised Code* not later than thirty days after the minor's birth;

(2) The court finds, after proper service of notice and hearing, that any of the following are the case:

(a) The putative father is not the father of the minor;

(b) The putative father has willfully abandoned or failed to care for and support the minor;

(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender

> of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.
>
> (C) Except as provided in *section 3107.071 [3107.07.1] of the Revised Code*, a parent who has entered into a voluntary permanent custody surrender agreement under division (B) of *section 5103.15 of the Revised Code*; . . . .

At the filing of the Petition for Adoption, the consent of the following parties were required to be addressed:

1. R.C. 3107.06(A): mother of the minor (Drucilla Bocvarov) – Her consent is not required in the adoption proceeding pursuant to R.C. 3107.07(C) because she entered into a voluntary permanent custody surrender agreement.

2. R.C. 3107.06(B): father of the minor (Jovan Bocvarov) – Pursuant to R.C. 3107.06(B)(1), Jovan Bocvarov is the "father" in the adoption proceeding because the minor was conceived while the father was married to the mother. His consent is not required in the adoption proceeding pursuant to R.C. 3107.07(C) because he entered into a voluntary permanent custody surrender agreement. Jovan Bocvarov was the one and only person who met the definition of "father" under R.C. 3107.06(B) at the time the petition was filed. Under Ohio law, the child cannot have two legal fathers at the same time. R.C. 3107.07(B)(3) excludes Appellee from the definition because he did not establish paternity ***PRIOR TO THE DATE THE PETITION WAS FILED.***

3. R.C. 3107.06(C): putative father of the minor (Benjamin Wyrembek, Appellee) – This is the only category that Appellee could met at the time the petition was filed. Appellants alleged in the petition that the consent of the putative father (Appellee) is not required pursuant to R.C. 3107.07(B)(2). Appellants were denied their right to have these allegations heard and the adoption process has not been followed.

4. R.C. 3107.06(D): agency having permanent custody of the minor (Adoption By Gentle Care) – The Agency has consented.

5. R.C. 3107.06(E): not applicable.

In this adoption proceeding, Appellee can only be a putative father under R.C. 3107.06(C). As set forth in R.C. 3107.01(H)(3), putative father is defined as a man who may be a child's father and has not been determined, ***PRIOR TO THE DATE A PETITION TO ADOPT THE CHILD IS FILED,*** to have a parent and child relationship with the child by a court proceeding or by an administrative agency proceeding. The word ***"PRIOR"*** in R.C. 3107.01(H)(3) can have no other meaning. Appellee is a putative father in this adoption proceeding and R.C. 3107.07(B), not R.C. 3107.07(A), applies. The November 30, 2009 decision by the Sixth District failed to address this clear and unambiguous statutory language. The decision of the Court of Appeals ignored the word ***"PRIOR"*** in R.C. 3107.01(H)(3) and failed to even address this controlling statutory language.

The definition of a putative father under Ohio law is defined in R.C. 3107.01(H)(3) and R.C. 3107.06(B)(3) and is the clear and unambiguous. The Court of

Appeals failed to address this clear and unambiguous statutory definition. Whereas, other appellate cases in Ohio have acknowledged and applied the clear and unambiguous statutory definition of putative father.

In the case of *In re Adoption of P.A.C.* (2009), 184 Ohio App. 3d 88, 2009 Ohio 4492, 919 N.E.2d 791, which has been accepted for review by this Supreme Court, the First Appellate District acknowledged and applied the clear and ambiguous definition of putative father, as set forth in R.C. 3107.01(H)(3). The First District refused to allow the putative father to change his status in the adoption proceeding, even though there was a pending paternity action when the adoption was filed. The determinative factor in the First District case was that the putative father had not established paternity prior to the date the petition to adopt the child was filed. After finding that the birth-father was a putative father in the adoption proceeding, the First District held that his consent was not required pursuant to R.C. 3107.07(B)(1) because he failed to registered.

The November 30, 2009 decision by the Sixth District cannot be distinguished from *In re Adoption of P.A.C.* because the issue of whether or not the putative father registered is not the determinative factor. The determinative factor is that the Probate Court, in any adoption proceeding involving a putative father as alleged in the filed petition, must apply the clear and ambiguous definition of putative father, as set forth in R.C. 3107.01(H)(3). The First District did apply the definition in *In re Adoption of P.A.C.*, which then resulted in the finding that the consent of the putative father was not required under R.C. 3107.07(B), specifically R.C. 3107.07(B)(1). If the Sixth District

followed the holding in *In re Adoption of P.A.C.* and correctly applied the clear and ambiguous statutory definition of putative father, the matter would have been remanded so that the case would proceed to address the allegations that the consent of the putative father is not required under R.C. 3107.07(B), specifically R.C. 3107.07(B)(2).

The First District stated that "[c]ourts have held, however, that the registration requirement is irrelevant if a putative father ceases to meet the statutory definition of a putative father before the adoption petition is filed. For example, if a putative father judicially or administratively establishes his parentage before the filing of the adoption petition, he ceases to be a putative father, and like any other father, his consent to the adoption is required unless an exception applies, regardless of his failure to timely register with the putative father registry." *Id.* at 184 Ohio App. 3d 92-93. It is the same issue and the November 30, 2009 decision by the Sixth District in this case conflicts with the correct decision of *In re Adoption of P.A.C.*

The November 30, 2009 decision by the Sixth District also conflicts with the Tenth Appellate District case of *In re Adoption of Baby Boy Brooks*. In *Brooks*, the Tenth District found that the putative father had established paternity prior to the filing of the adoption petition and, therefore, was no longer a putative father. The determinative factor in *Brooks*, as in *In re Adoption of P.A.C.*, was the clear and ambiguous definition of putative father, as set forth in R.C. 3107.01(H)(3). The Tenth District did apply the definition, which then resulted in the finding that the birth-father was no longer the putative father. The fact

that the birth-father failed to register was not relevant. Even if the birth-father had registered, it still was not relevant to the determinative issue, which is whether or not he was a putative father on the date the adoption petition was filed. Therefore, a conflict now exists between the correct decision of the Tenth Appellate District and the incorrect decision of the Sixth Appellate District in this case.

The *Pushcar* case was misinterpreted and misapplied by the lower courts. *Pushcar* only addressed the one-year statute relating to a "parent" and did ***NOT*** address any allegations relating to the consent of a ***PUTATIVE FATHER***. *Pushcar* has nothing to do with the allegations in this case that the consent of the putative father is not required. A court must do more than read a headnote from a case to determine if a case applies. The headnote from *Pushcar* that includes language about the Probate Court refraining from proceeding with the adoption until the paternity case is completed in Juvenile Court is only relevant to the initiation of the one-year period. Nothing else makes sense and the Lucas County Probate Court and the Sixth District obviously failed to read and understand the entire text of *Pushcar*. It is very clear that *Pushcar* does not apply and Appellee is a putative father in this adoption proceeding, because that is what he was when the adoption petition was filed and that is the clear law that applies to adoptions in Ohio.

Pushcar involved a step-parent adoption where the Probate Court found that the consent of father was not required pursuant to R.C. 3107.07(A) based upon his failure to communicate with the child for a one year period. The father was named on the birth certificate,

but had not yet established paternity. (This aspect of Ohio law changed in 2001. The putative father can now only be named on the birth certificate if the Affidavit of Paternity is executed by mother and putative father. The Affidavit of Paternity establishes paternity.) The Appellate Court in *Pushcar* held that the Probate Court could not allow the adoption to proceed under R.C. 3107.07(A) because there had been no judicial determination of paternity. This Supreme Court affirmed and held that, in such circumstances, the Probate Court must defer to the Juvenile Court and refrain from addressing the matter until adjudication in the Juvenile Court. *Pushcar* has never had any application to this adoption proceeding. *Pushcar* is only applicable to R.C. 3107.07(A) cases, and has no application to R.C. 3107.07(B) cases. The entire basis of the decision in *Pushcar* was that the requisite one-year statute for failure to communicate did not begin to run until the date of the establishment of paternity. The one-year statute and *Pushcar* do not apply to the present case. The establishment of paternity is not relevant in the present case. Appellee is a putative father in this adoption proceeding and the allegation is that his consent is not required pursuant to R.C. 3107.07(B), and not pursuant to R.C. 3107.07(A), as in *Pushcar*.

The case of *In re Adoption of Sunderhaus* (1992), 63 Ohio St. 3d 127, 585 N.E.2d 418 is no different than *Pushcar* and likewise does not apply to this adoption proceeding. *Sunderhaus* was also a R.C. 3107.07(A) case. The holding in *Sunderhaus* was "the one-year period of nonsupport prescribed by *R.C. 3107.07(A)* which obviates the requirement to obtain parental consent to an adoption pursuant to *R.C. 3107.06* commences on the date that parentage has been

judicially established." *Id.* at 132. The Court stated that "[t]he ability to dispense with the consent requirement under *R.C. 3107.07(A)* is dependent upon two factors: (1) the establishment of the parent-child relationship, and (2) the failure to satisfy the support obligation arising therefrom." *Id.* at 130. The Court also noted the distinction between the parental consent and the putative father as follows:

> This distinction is illustrated by a comparison of the provisions governing a judicial determination of paternity contained in *R.C. 3111.08(B)* and *3111.12* with the less stringent standards governing the demonstration necessary to establish one as a "putative father" from whom consent to the adoption is not required pursuant to *R.C. 3107.07(B)*. *Id.* at 131, fn. 3

The above language of the *Sunderhaus* case is clear. The holding in *Sunderhaus* does not apply to putative fathers and does not apply to this adoption proceeding.

The case of *In re Adoption of Asente* (2000), 90 Ohio St. 3d 91, 2000 Ohio 32, 734 N.E.2d 1224 also does not apply to the present case. *Asente* involved an interstate adoption where the child was placed by Kentucky birth-parents with Ohio adoptive parents. The case was litigated all the way to both this Ohio Supreme Court and the Kentucky Supreme Court. This Ohio Supreme Court declined jurisdiction in Ohio because there was a specific proceeding pending in Kentucky that was part of the adoption process and proceeding. The central issue being litigated in Kentucky was whether or not the consents for adoption executed by the birth-parents were valid under Kentucky law. The present case does not involve a parental consent or a

case pending in another court that is part of the adoption process and proceeding. The present case involves the application of the clear statutory mandate relating to a putative father and *Asente* does not apply.

It is well established that the Probate Court has original and exclusive jurisdiction over any adoption filed in its court. This Supreme Court has held that "original and exclusive jurisdiction over adoption proceedings is vested specifically in the Probate Court pursuant to R.C. Chapter 3107" *State ex rel. Portage Co. Welfare Dept. v. Summers* (1974), 38 Ohio St. 2d 144, 151, 67 O.O.2d 151, 311 N.E.2d 6. It has also long been established that adoption "embraces not only custody and support but also descent and inheritance and in fact every legal right with respect to the child." *In re Adoption of Biddle* (1958), 168 Ohio St. 209, 214, 6 O.O.2d 4, 152 N.E.2d 105. A pending case may be considered relevant to the adoption proceeding if it directly relates to a substantive issue in the adoption proceeding. To hold otherwise is a failure to acknowledge the original and exclusive jurisdiction of the Probate Court. If the allegation is that a parent's consent is not required pursuant to R.C. 3107.07(A) because that parent failed to communicate or support for the one-year period, a paternity action that establishes the starting point for the one-year period may be relevant. However, a paternity action has no relevance to the allegations relating to a putative father pursuant to R.C. 3107.07(B).

The Sixth Appellate District in the case of *In re Adoption of Joshua Tai T.* (2008), 2008 Ohio 2733, 2008 Ohio App. LEXIS 2292 (Ohio Ct. App., Ottawa County June 2, 2008) distinguished *Pushcar* as follows:

Appellant has argued that the trial court was required to refrain from consideration of the adoption petition under the Ohio Supreme. Court's decision of *In re Adoption of Pushcar, 110 Ohio. St.3d 332, 2006 Ohio 4572, 853 N.E.2d 647.*

The trial court overruled the motion and held that the decision of *In re Adoption of Pushcar* was distinguishable. We agree. In *Pushcar,* the issue of paternity of the child was pending in juvenile court at the time the petition for adoption was filed in probate court. The *Pushcar* court recognized that establishing paternity was a necessary element of the petitioner's case for adoption as the adoption in the case was being sought without the consent of the father under *R.C. 3107.07(A). Id., P 13.* The court reasoned that establishing paternity was a necessary element of petitioner's case for adoption. In view of that fact, the probate court should have deferred proceeding on the adoption until the juvenile court had adjudicated paternity. Here, however, paternity is not disputed and the juvenile court's involvement in prior proceedings was limited to continuing jurisdiction over custody.

In *Pushcar,* the Ohio Supreme Court reaffirmed that original and exclusive jurisdiction over adoptions in Ohio is vested in probate court. *Id., P 9.* Furthermore, probate courts have jurisdiction to proceed with adoptions even where the involved child is subject to custody orders within the continuing jurisdiction of domestic relations or juvenile courts. *In re*

> *Adoption of Biddle (1958), 168 Ohio St. 209, 152 N.E.2d 105*, paragraph two of syllabus (continuing jurisdiction of domestic relations court); *In re Hitchcock (1996), 120 Ohio App.3d 88, 103-104, 696 N.E.2d 1090* (continuing jurisdiction of juvenile court). Accordingly, appellant's argument that the trial court should have deferred proceeding with the adoption due to the pending jurisdiction of juvenile court over custody of Joshua is without merit. *Id.* at 13-14.

The case of *In re Adoption of Joshua Tai T.* is directly on point with the present case. The allegation in this adoption proceeding is that the consent of the putative father is not required pursuant to R.C. 3107.07(B). The case that was pending in the Lucas County Juvenile Court did not bar the Probate Court from proceeding with the adoption. The Probate Court has original and exclusive jurisdiction over this adoption. The establishment of paternity in the Lucas County Juvenile Court case was not a "necessary element" of the Petitioners' case in this adoption proceeding. The establishment of paternity is not a "necessary element" and is not relevant in this adoption proceeding.

The Eight Appellate District in the case of *In re T.N.W.* (2008), 2008 Ohio 1088, 2008 Ohio App. LEXIS 929 (Ohio Ct. App., Cuyahoga County Mar. 13, 2008) also found *Pushcar* to be inapplicable. The Court rejected the argument that the adoption should have been enjoined from proceeding and held that "a ruling from the juvenile court on the issue of parentage was not needed to proceed with the adoptions." *Id.* at 7.

In further support of the Probate Court's exclusive jurisdiction over this adoption is the fact that the R.C. 3127.23 Affidavit does not apply to this adoption proceeding. Ohio probate courts have required the filing of this Affidavit in adoption proceedings for years, which requires disclosure of other pending cases. The former Ohio code section is R.C. 3109.27, which was part of the Uniform Child Custody Jurisdiction Act ("UCCJA"). In 2005, Ohio passed the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which superseded the UCCJA. The Ohio code section for the Affidavit is now R.C. 3127.23. Where the UCCJA was not clear as to its applicability to adoption proceedings, the UCCJEA is now very clear. R.C. 3127.02 states that UCCJEA provisions do not govern adoption proceedings. Therefore, other proceedings are not relevant if such proceedings do not affect the substantive issues in the adoption.

Appellee may not change his status from a "putative father" to a "father' inside the adoption proceeding. This is contrary to the original and exclusive jurisdiction of the Probate Court over adoption proceeding. If the decision of the Sixth District is not reversed, the jurisdiction of the Probate Court over any and all adoption proceedings will be questionable. The decision must be reversed to maintain the integrity of the Probate Court and of the adoption process. In addition to the jurisdictional issue, if the decision of the Sixth District is not reversed, the entire statutory scheme that includes the Putative Father Registry will become meaningless. There can be no question that the decision of the Probate Court in this case creates an exception to the requirements of the Putative Father Registry. Once one exception is created, there can be no further

reliance on the Registry and the entire process falls apart. The decision of the Probate Court is in clear contradiction of the intent of the Registry. A summary of the legislative history and the legislative intent of the Putative Father Registry was detailed in *In re Adoption of Baby Boy Brooks* as follows:

> The Ohio Legislative Service Commission prepared an analysis of Am.Sub. H.B. No. 419, which provides insight into the legislative intent behind the changes to the adoption statutes. 3 Baldwin's Ohio Legislative Service (1996), L-336. The Legislative Service Commission cautions that the final version of bills may be different from the legislative analysis because they are subject to floor amendments and conference committee changes. *Id.* According to the analysis, the changes to the adoption laws require a putative father to register with the putative father registry within thirty days of the child's birth or his consent will not be required. *Id.* at L-336, L-346. The original version of *R.C. 3107.07(B)(1)*, as amended by Am.Sub.H.B. No. 419, contained an exception to the requirement of registration within thirty days if the putative father was not able to register within the thirty-day time period for reasons beyond his control, other than a lack of knowledge of the child's birth, but the putative father must register within ten days after it becomes possible for him to register or his consent will not be required. *Id.* at L-287, L-346. However, this exception in *R.C. 3107.07(B)(1)* was removed from the final version of Am.Sub.H.B. No. 419. See *R.C. 3107.07(B)(1)*, effective September 18, 1996.

> Thus, the General Assembly determined that there would be no exceptions to the thirty-day filing requirement.
>
> Given that the legislature did not intend for there to be any exceptions to the registration requirement, that the purpose of the adoption laws is to provide children with a stable home in an expeditious manner, and that adoption laws are to be strictly construed, I conclude that the General Assembly intended in *R.C. 3107.07(B)(1)* to eliminate the necessity of a putative father's consent to an adoption if he fails to register with the putative father registry within thirty days of the child's birth.
>
> *Id.* at 834.

If the decision in case is not reversed, the Ohio Putative Father Registry will be meaningless. If a putative father can change his status in an adoption proceeding by filing a paternity suit, whether he registered or not, there can be no further reliance on the Ohio Putative Father Registry. R.C. 3107.07(B) will become meaningless. The entire adoption process will fall apart. Thousands of Ohio children every year will be in an uncertain status and their permanency will be in question. There must be compliance with the clear statutory law and the directive of this Ohio Supreme Court that "[u]ltimately, the goal of adoption statutes is to protect the best interests of children. In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home. . . and ensuring that the adoption process is completed in an expeditious manner." *Zschach* at 665 N.E.2d 1073. By following the clear

statutory language and the clear adoption process set forth in the Ohio Revised Code, the adoption process will be completed expeditiously, which will be in the best interests of all parties, especially the child.

Conclusion

For the reasons set forth above, the Appellants respectfully requests this Supreme Court to REVERSE the decision of the Sixth Appellate District and REMAND the matter for further proceedings.

Respectfully submitted,

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[*Certificate of Service omitted in printing of this appendix*]

* * *

[Attachment 1 [App. 1-2], Notice of Appeal, dated December 30, 2009, is reproduced in this appendix at Appendix J 84a - 86a]

* * *

[Attachment 2 [App. 3-13], Decision and Judgment, dated November 30, 2009, is reproduced in this appendix at Appendix B 20a - 29a]

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[Attachment 3 [App. 14-17], Judgment Entry, dated June 4, 2009, is reproduced in this appendix at Appendix H 46a - 53a]

* * *

[Attachment 4 [App. 18-22]]

Cited Provisions of the Ohio Revised Code

§ 2151.011 Definitions

(A) As used in the Revised Code: . . .

(3) "Private child placing agency" means any association, as defined in section 5103.02 of the Revised Code, that is certified under section 5103.03 of the Revised Code to accept temporary, permanent, or legal custody of children and place the children for either foster care or adoption.

§ 3107.01 Definitions

As used in sections 3107.01 to 3107.19 of the Revised Code: . . .

(H) "Putative father" means a man, including one under age eighteen, who may be a child's father and to whom all of the following apply:

(1) He is not married to the child's mother at the time of the child's conception or birth;

(2) He has not adopted the child;

(3) He has not been determined, prior to the date a petition to adopt the child is filed, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative agency proceeding in another state;

(4) He has not acknowledged paternity of the child pursuant to sections 3111.21 to 3111.35 of the Revised Code.

§ 3107.04 Where petition to be filed; caption

(A) A petition for adoption shall be filed in the court in the county in which the person to be adopted was born, or in which, at the time of filing the petition, the petitioner or the person to be adopted or parent of the person to be adopted resides, or in which the petitioner is stationed in military service, or in which the agency

having the permanent custody of the person to be adopted is located.

§ 3107.06 Who must consent

Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:

(A) The mother of the minor;

(B) The father of the minor, if any of the following apply:

(1) The minor was conceived or born while the father was married to the mother;

(2) The minor is his child by adoption;

(3) Prior to the date the petition was filed, it was determined by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative proceeding in another state that he has a parent and child relationship with the minor;

(4) He acknowledged paternity of the child and that acknowledgment has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code.

(C) The putative father of the minor;

(D) Any person or agency having permanent custody of the minor or authorized by court order to consent;

(E) The minor, if more than twelve years of age, unless the court, finding that it is in the best interest of the minor, determines that the minor's consent is not required.

§ 3107.07 Who need not consent

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

(B) The putative father of a minor if either of the following applies:

(1) The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 of the Revised Code not later than thirty days after the minor's birth;

(2) The court finds, after proper service of notice and hearing, that any of the following are the case:

(a) The putative father is not the father of the minor;

(b) The putative father has willfully abandoned or failed to care for and support the minor;

(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

(C) Except as provided in section 3107.071 of the Revised Code, a parent who has entered into a voluntary permanent custody surrender agreement under division (B) of section 5103.15 of the Revised Code;

§ 3109.042 Custody rights of unmarried mother

An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian. A court designating the residential parent and legal custodian of a child described in this section shall treat the mother and father as standing upon an equality when making the designation.

§ 3111.03 Presumption of paternity

(A) A man is presumed to be the natural father of a child under any of the following circumstances:

(1) The man and the child's mother are or have been married to each other, and the child is born during the

marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement.

§ 3127.02 Exceptions to provisions

Sections 3127.01 to 3127.53 of the Revised Code do not govern adoption proceedings or proceedings pertaining to the authorization of emergency medical care for a child.

§ 5103.15 Agreements for temporary custody.

...(B)(2) The parents of a child less than six months of age may enter into an agreement with a private child placing agency surrendering the child into the permanent custody of the agency without juvenile court approval if the agreement is executed solely for the purpose of obtaining the adoption of the child. The agency shall, not later than two business days after entering into the agreement, notify the juvenile court. The agency also shall notify the court not later than two business days after the agency places the child for adoption. The court shall journalize the notices it receives under division (B)(2) of this section.

§ 5103.23 Interstate compact on placement of children enacted

The interstate compact on the placement of children is hereby enacted into law and entered into with all other jurisdictions legally joining therein in form substantially as follows:

Article I. Purpose and Policy.

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(A) Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.

(B) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.

(C) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.

(D) Appropriate jurisdictional arrangements for the care of children will be promoted.

Article II. Definitions.

As used in this compact:

(A) "Child" means a person who, by reason of minority, is legally subject to parental, guardianship or similar control.

(B) "Sending agency" means a party state, officer or employee thereof; a subdivision of a party state, or

officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to another party state.

(C) "Receiving state" means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons.

(D) "Placement" means the arrangement for the care of a child in a family free or boarding home, or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective, or epileptic, or any institution primarily educational in character, and any hospital or other medical facility.

Article III. Conditions for Placement.

(A) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

(B) Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state

written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(1) The name, date and place of the birth of the child;

(2) The identity and address or addresses of the parents or legal guardian;

(3) The name and address of the person, agency, or institution to or with which the sending agency proposes to send, bring, or place the child;

(4) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(C) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to division (B) of this article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

(D) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

Article IV. Penalty for Illegal Placement.

The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place, or care for children.

Article V. Retention of Jurisdiction.

(A) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed therein.

(B) When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of such case by the latter as agent for the sending agency.

(C) Nothing in this compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting as agent in that state for a private charitable agency of the sending state; nor to prevent the agency in the receiving state from discharging financial responsibility for the support and maintenance of a child who has been placed on behalf of the sending agency without relieving the responsibility set forth in paragraph (A) hereof.

Article VI. Institutional Care of Delinquent Children.

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact but no such placement shall be made unless the child is given a court hearing on notice to the parent or guardian with opportunity to be heard prior to his being sent to such other party jurisdiction for institutional care and the court finds that:

(A) Equivalent facilities for the child are not available in the sending agency's jurisdiction; and

(B) Institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship.

Article VII. Compact Administrator.

The executive head of each jurisdiction party to this compact shall designate an officer who shall be general coordinator of activities under this compact in his jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.

Article VIII. Limitations.

This compact shall not apply to:

(A) The sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state.

(B) Any placement, sending or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law.

Article IX. Enactment and Withdrawal.

This compact shall be open to joinder by any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of congress, the government of Canada, or any province thereof. It shall become effective with respect to any such jurisdiction when such jurisdiction has enacted the

same into law. Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until two years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

Article X. Construction and Severability.

The provisions of this compact shall be liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state party thereto, the compact shall remain in full force and effect as to the state affected as to all severable matters.

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No. 10-882

FILED

In the
Supreme Court of the United States

IN RE ADOPTION OF G.V.

JASON AND CHRISTY VAUGHN,
Petitioners,

v.

BENJAMIN J. WYREMBEK,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Benjamin J. Wyrembek ("Respondent") respectfully requests that this Court deny the petition for a writ of certiorari ("Petition") filed by Petitioners Jason and Christy Vaughn ("Petitioners"). Petitioners seek review of the decision of the Ohio Supreme Court in *In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349, 933 N.E.2d 245, reconsideration denied 127 Ohio St.3d 1247, 2010 Ohio 4879 (hereinafter "*In re G.V.*"). In *In re G.V.*, the Ohio Supreme Court affirmed the appellate court's dismissal of Petitioners' adoption petition based on *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647. In affirming the appellate decision, the Ohio Supreme Court did not address any federal questions or constitutional claims as none were presented to it. Rather, the Ohio Supreme Court disposed of Petitioners' adoption petition under state law.

This case involves family and adoption law. These areas are traditionally the responsibility of the state. The facts in this case do not warrant intervention by this Court.

COUNTERSTATEMENT OF THE CASE

Petitioners statement of the case contains many allegations that are not supported by the record below. Most of Petitioners' statement contains allegations that are untrue and never litigated in the court below. The facts that are in the record support the following.

Grayson Bocvarov was born October 29, 2007, in Lucas County, Ohio. Within days after the child's birth, the mother (Drucilla Bocvarov) and her ex-

husband (Jovan Bocvarov) attempted to surrender the child into the permanent custody of a private child placing agency ("private agency"), pursuant to Ohio Rev. Code Ann. § 5103.15(A)(2). In both surrenders, Grayson was identified not as "Grayson Thomas Bocvarov," but as "Grayson Thomas Vaughn." (Pet. Appx. D & E). In his surrender of the child, the ex-husband stated: "I am not the biological father." (Pet. Appx. F).

The private agency immediately placed the child out-of-state with Indiana residents, Petitioners Vaughn. In the form from the Interstate Compact on the Placement of Children ("ICPC"), Grayson Thomas Bocvarov was again identified as "Grayson Thomas Vaughn." (Pet. Appx. F). The form was otherwise not complete and did not comply with Ohio law.

Within 17 days after the child's birth, Respondent registered with the Ohio Putative Father Registry, well within the 30-day time limit allowed by Ohio law. Within two months of the child's birth, on December 28, 2007, Respondent filed in the juvenile court of Fulton County, Ohio, a parentage and custody complaint relative to Grayson. Respondent served the complaint on both Petitioners and the private agency as party defendants. Shortly thereafter, the case was transferred to the juvenile court in Lucas County, Ohio, through the efforts of Petitioners.

On January 16, 2008, Petitioners filed a petition for adoption in the probate court of Lucas County, Ohio. The probate court ordered that Respondent be served with notice of the adoption petition. Respondent was served and filed an objection to the adoption on April 23, 2008. On May 19, 2008, the probate court stayed

the adoption proceedings pending determination of the parentage action in juvenile court.

Petitioners then proceeded to delay the parentage action and frustrate Respondent's efforts to establish a relationship with Grayson. Petitioners filed a motion to dismiss in the juvenile court, objecting to jurisdiction and asserting that the Lucas County, Ohio probate court had exclusive jurisdiction over the child. On June 20, 2008, the juvenile court ordered genetic testing. On July 24, 2008, the juvenile court ruled that it had jurisdiction to determine the parentage complaint, and denied party status to Petitioners. Petitioners appealed the June 20th order. The Ohio appellate court granted a temporary stay of the genetic testing and then ruled on September 2, 2008, that an order for genetic testing was not a final appealable order.

On September 10, 2008, Petitioners filed in the Ohio appellate court an original action in prohibition seeking an order prohibiting the judge of the juvenile court from proceeding with the parentage action. The appellate court again stayed the genetic testing. On January 16, 2009, the appellate court found that Petitioners did not show that the judge was without legal authority to preside over the paternity action. The appellate court vacated the stay on the order for genetic tests. *See State ex rel. Jason [V.] v. Cubbon*, 180 Ohio App.3d 595, 2009-Ohio-267, 906 N.E.2d 502.

Petitioners then tried unilaterally to limit the order. Petitioners asserted that the genetic tests could not be used to determine Respondent's status as a parent, but could only be used to obtain the natural father's social and medical history pursuant to Ohio

Rev. Code Ann. §§ 3107.09 and 3107.091. The genetic testing was performed in February 2009. On March 17, 2009, the juvenile court issued a judgment entry declaring Respondent to be Grayson's father. No limitations were placed on this order and Respondent was found to be the biological parent for all legal purposes. In this order, the juvenile court dismissed all pending motions and relieved the Guardian ad Litem of her duties. The juvenile court did *not* dismiss the parentage and custody action.

On June 4, 2009, the Lucas County probate court recognized that Respondent was Grayson's parent and dismissed the petition for adoption. (Pet. Appx. H).

On November 30, 2009, The Ohio Sixth District, Court of Appeals, affirmed the dismissal of Petitioners' petition for adoption. *In re G.V.*, 2009-Ohio-6338. (Pet. Appx. B). Ultimately, the Ohio Supreme Court upheld this decision in *In re G.V.*, 126 Ohio St.3d 249, and also denied Petitioners' request for reconsideration. (Pet. Appx. A & C).

The following facts were not part of the Ohio appellate and supreme court record. Respondent believes these facts, which are of public record, have relevance to this matter. The Ohio Supreme Court did not address any federal constitutional issues. However, Petitioners did seek relief in the federal courts. On January 14, 2010, Petitioners filed in federal court a due process and civil rights complaint against the Lucas County Probate Judge and Respondent. The federal court dismissed Petitioners' action for lack of subject-matter jurisdiction. *Bocarov (sic, Bocvarov)[Vaughn] v. Judge Puffenberger [Wyrembek]*, 2010 U.S. Dist. LEXIS 114176 (Ohio S.D.

Oct. 27, 2010). This order was never appealed by Petitioners. This federal court case involved many of the issues raised in the Petition filed with this Court.

Petitioners continued with a multitude of other frivolous litigation involving this child. The public record shows Petitioners have sought relief in every forum prior to their misguided attempt to seek relief in this Court. On November 5, 2010, Petitioners filed against Respondent a petition for writ of habeas corpus in the Ohio Tenth Appellate District. *In re G.T.B.*, 10th Dist. No. 10-AP-001057. Petitioners requested a writ ordering Respondent to immediately transfer to Petitioners the physical custody of Grayson. Respondent filed a motion to dismiss. The Ohio appellate court on December 1, 2010, dismissed Petitioners' action based on the lack of jurisdiction to review the decisions of Lucas County Juvenile Court. Petitioners appealed that decision to the Supreme Court of Ohio. *In re G.T.B. [Vaughn v Wyrembek]*, Ohio S.C. Case No. 2010-2266. Respondent moved the Ohio Supreme Court to dismiss the appeal. As of February 1, 2011, the appeal was still pending.

Petitioners also filed second, third and fourth petitions to adopt Grayson. The second petition was filed in the Indiana court in December 2009. The Indiana court consolidated Petitioners' custody and adoption proceedings. The Indiana court ultimately held that Indiana did not have jurisdiction over Grayson, vacated the temporary custody order and ordered Petitioners to turn over possession of Grayson to the private agency. Petitioners' third adoption petition was filed in April 2010 in the probate court of Lucas County, Ohio, and was based on Ohio Rev. Code Ann. § 3107.07(A). Respondent filed objections and a

motion to dismiss the petition. Petitioners withdrew their Lucas County adoption petition in August 2010. On September 13, 2010, Petitioners filed a fourth adoption petition in the probate court of Franklin County, Ohio. This petition was also based on Ohio Rev. Code Ann. § 3107.07(A). Respondent filed objections and a motion to dismiss. The Franklin County petition for adoption was dismissed by a magistrate. Petitioners filed objections to that dismissal. The Franklin County probate court has not yet held a hearing on Petitioners' objections to the magistrate's decision.

Petitioners also filed in the Supreme Court of Ohio four original actions in prohibition seeking an order prohibiting the Lucas County juvenile court judge from proceeding with Respondent's custody request. In the first prohibition action, on August 4, 2009, the Ohio Supreme Court considered the juvenile judge's answer and motion for judgment on the pleadings, granted that motion and dismissed prohibition action. *State ex rel. Vaughn v. Judge Cubbon*, 122 Ohio St.3d 1487, 2009-Ohio-3830, 910 N.E.2d 1040. Petitioners then filed three additional writs of prohibition against the juvenile judge and each of these cases were dismissed. *See State ex rel. Vaughn v. Cubbon*, 122 Ohio St.3d 1528, 2009-Ohio-4944, 913 N.E.2d 983; *State ex rel. Vaughn v. Cubbon*, 124 Ohio St.3d 1471, 2010-Ohio-354, 921 N.E.2d 243; *State ex rel. Vaughn v. Cubbon*, 126 Ohio St.3d 1557, 2010-Ohio-4169, 933 N.E.2d 266.

REASONS FOR DENYING THE PETITION

This Court does not have jurisdiction to review this case. Petitioners did not present to the Ohio Sixth District, Court of Appeals, or to the Ohio Supreme

Court any of the federal questions asserted in their Petition. These courts merely interpreted Ohio statutes that relate to the adoption process in Ohio. Petitioners do not raise any important, unsettled federal question that should be resolved by this Court. Petitioners do not implicate any important federal question that has been decided in a way that conflicts with relevant decisions of this Court. As a result, Petitioners have not shown any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The State Courts Were Not Presented with and Did Not Rule on a Federal Question.

The scope of the Court's jurisdiction to review state court decisions is defined by 28 U.S.C. § 1257(a). It is well settled that the Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), quoting *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). If federal claims were not pressed or passed upon in state court, this Court will not decide the federal claims. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988).

In the first and second questions for review, Petitioners suggest that persons with whom a child has been placed for purposes of adoption, as well as the proposed adoptee, have a fundamental liberty interest in their placement family and have a due process right to notice and hearing before the child is removed from their placement home. Petitioners ignore that the removal of the child by the private agency and the placement with Petitioners were not legal under Ohio

law. It is tantamount to arguing that a kidnapper of a child obtains rights relative to that child.

Petitioners did not present their first and second questions to the state courts. In their petition for adoption of Grayson, Petitioners did claim a federal due process right of the birth-mother. (Pet. Appx. G, at p. 43a). Petitioners stated that Ohio Rev. Code Ann. §3107.06(C) "is unconstitutional in its application to this placement and petition [for adoption], where the right of the birth-mother to place this infant at birth for adoption is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution[.]" Petitioners, however, did not present in their adoption petition any federal title, right or privilege held by Petitioners or by Grayson. Petitioners did not raise any federal title, right or privilege in their briefs filed in the state appellate and supreme courts. (Pet. Appx. I & K). The decisions of the probate court, the appellate court and the state supreme court did not rule on any federal claim of Petitioners or Grayson. (Pet. Appx. H, B & A).

The liberty interest and due process rights now claimed by Petitioners were not pressed or passed upon in the state courts below. The Court must decline Petitioners' first and second questions presented for review.

II. There Are No Important, Unsettled Federal Questions That Should Be Settled by This Court.

Petitioners suggest that there are substantial, unsettled questions concerning whether prospective adoptive parents and the proposed adoptee should be

afforded constitutional protections. Even though these issues were not presented below or properly preserved for appeal, Respondent submits that these issues are without merit.

A. Prospective Adoptive Parents Do Not Have the Same Fundamental Liberty Interest as Natural Parents.

Petitioners propose that prospective adoptive parents have a constitutional right to the care, custody and control of the child placed with them for adoption. To support this proposition, Petitioners refer to *Smith v. Organization of Foster Families for Equality and Reform (OFFER),* 431 U.S. 816 (1977), and the unresolved issue of a protected liberty interest for the foster family. In *OFFER*, the Court cautioned that any liberty interest of the foster family would be weakened by the natural parents' interest. In *OFFER*, the Court stated:

"It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right – an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal

from the foster family is to return the child to his natural parents." *Id.* at 846-847.

Similarly, any liberty interest for a placement or adoptive family must be substantially dependent upon the legality of the placement and upon the interests of the natural parents. In the present case, Petitioners' proposed protected interest rests upon the false assumption that Grayson was legally placed with Petitioners. The state courts below did not rule on this issue. The law and facts show that Grayson's placement was not legal. Grayson's placement was improperly obtained through a permanent surrenders which had no legal effect and through improper filings within the ICPC.

1. Permanent Surrenders, Ohio Rev. Code Ann. § 5103.15(B)(2)

Ohio Rev. Code Ann. § 5103.15(B)(2) allows the "parents" of a child to enter into an agreement with a private child placing agency and surrender the child into the permanent custody of the agency. Ohio Rev. Code Ann. § 2151.011(B)(30) and Rule 2(Z) of the Ohio Rules of Juvenile Procedure both state that:

> "'Permanent custody' means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the ***natural parents*** or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations." (Emphasis added.)

The adoption agency obtained the permanent surrenders of the natural mother and the legally presumed father. The Ohio Supreme Court in *Adoption Link, Inc. v. Suver*, 112 Ohio St.3d 166, 2006 Ohio 6528, 858 N.E.2d 424 (2006), held that a permanent surrender signed by a parent who did not have custody of that child was invalid and of no force and effect. Here, the record is clear that Jovan Bocvarov's surrender was not valid as he did not have custody of this child. Any legal presumption in this case was further nullified by Jovan Bocvarov stating in his surrender that: "I am not the biological father." (Pet. Appx. E). In contrast, Ohio law did allow Respondent, as a registrant with the putative father registry, rights in a voluntary surrender under Ohio Rev. Code Ann. § 5103.15(B)(2). See Ohio Administrative Code § 5101:2-48-02(I), eff. 9-1-03 to 5-15-09. The private adoption agency did not obtain the permanent surrender of Respondent, the natural father.

2. ICPC, Ohio Rev. Code Ann. § 5103.23

The ICPC requires compliance with the laws of the sending state. See *In re Adoption of Lichtenberg*, 12th Dist. No. CA2002-11-125, 2003-Ohio-1014, at ¶13. Ohio's requirements for an ICPC placement are stated in Ohio Administrative Code § 5101:2-52-06. This rule provides in pertinent part as follows:

> "I If an Ohio PCPA [private child placing agency], PNA or court is planning the placement of a child into another state or territory, the PCPA, PNA or court shall send the following to the Ohio ICPC office for each placement resource being requested:

"***

"(i) Documentation indicating the child is legally free for adoption by submitting the JFS 01666 "Permanent Surrender of a Child" (rev. 6/2006) or a document demonstrating that parental rights have been terminated; and the agency's authority to place the child for adoption.

"(ii) The JFS 01695 "Application for Search of Ohio's Putative Father Registry" (rev. 3/2008). ***"

Based on these requirements, the private agency in the present case was required to obtain the consent of both *birth* parents. The private agency obtained the permanent surrender of the birth mother. However, it did not obtain the permanent surrender of the birth father. As a birth father who timely registered, Respondent had rights in a permanent surrender (JFS 01666) under the ICPC pursuant to the laws of Ohio, i.e., Ohio Rev. Code Ann. § 5103.15(B)(2), and Ohio Administrative Code § 5101:2-48-02(I), eff. 9-1-03. The child's placement with Petitioners pursuant to the ICPC required Respondent's consent, as a matter of law. The private agency was also required to fully complete the forms required under the ICPC. The forms did not list any parents and did not list the birth name of the child. Grayson's placement was not valid and enforceable under the ICPC.

3. No Reasonable Expectation in Permanency

Petitioners contend that, unlike the foster parents in OFFER, they had an expectation that their family

unit was permanent. Petitioners' assertion is not based in fact. Respondent timely registered with the putative father registry. Respondent served Petitioners with his paternity and custody complaint when Grayson was less than three months old. Respondent filed objections to the adoption. Respondent obtained visitation rights with Grayson and attempted to implement those rights. Reasonable persons should have known that Respondent wanted the care, custody and control of his son. Reasonable persons would not expect to adopt the child of another who, like Respondent, demonstrated interest, diligence and persistence to obtain a relationship with the child. Petitioners therefore did not have an expectation of a permanent relationship with Grayson.

4. No "Clean Hands"

Respondent's parentage action was repeatedly delayed by Petitioners. The opportunity to resolve the parentage issues within two months of birth, while the child was still an infant, was destroyed by Petitioners' delays. Petitioners had nothing to lose by delaying the parentage and custody proceedings in juvenile court. In fact, as a result of their delays, Petitioners manufactured the argument that the child had bonded with them and their family and that removal from their home was not in the child's best interests. Petitioners have created the current proposal for constitutional rights for prospective adoptive parents and the proposed adoptee by their delaying tactics. Petitioners never had a legal right to have this child, let alone any constitutional rights.

For these reasons, there is no substantial, unsettled question respecting a constitutionally protected liberty

interest or due process rights for prospective adoptive parents or for Petitioners.

B. The Proposed Adoptee Does Not Have a Fundamental Liberty Interest in the Prospective Adoptive Family Unit.

Petitioners contend that a child placed with prospective adoptive parents has a liberty interest in the adoptive family unit and a due process right in notice and a hearing prior to removal from the placement home. Again, this issue was never raised in the lower courts. Petitioners conveniently limit their proposal for the child's constitutional rights to purposes of adoption. Petitioners either deliberately ignore or are oblivious to a potential liberty interest more basic than an interest in an adoptive family. Grayson arguably had a basic human right, symmetrical with that of his natural parent, to establish a parent-child relationship with Respondent. Respondent took steps to safeguard his parental rights shortly after Grayson's birth. He timely registered with the putative father registry. He filed a parentage and custody action. As such, Grayson's potential liberty interest to be in the care, custody and control of Respondent arose shortly after his birth. Petitioners denied Grayson his constitutional rights.

For these reasons, there is no substantial, unsettled issue concerning fundamental or due process rights of a child to a prospective adoptive family.

III. There Are No Important Federal Questions That Have Been Decided in a Way That Conflicts with Relevant Decisions of This Court.

Petitioners claim that the state courts below misapplied the definition of "putative father" in Ohio Rev. Code Ann. § 3107.01(H)(3) and improperly classified Respondent as a father in violation of this Court's precedent. Petitioners again seek to gain an audience with this Court even though the Ohio Supreme Court decision was based solely on an interpretation of Ohio law.

This Court has held that an unwed father who has taken steps to establish a custodial or supportive relationship with the child has a constitutionally protected interest in that relationship. *Caban v. Mohammed*, 441 U.S. 380 (1979), *Stanley v. Illinois*, 405 U.S. 645 (1972). The Due Process Clause and Equal Protection Clauses of the United States Constitution bar the state from terminating the parental rights of the unwed father without the same showing of unfitness required to terminate the rights of a mother or a married father. *Caban*, 441 U.S. at 393-394; *Stanley*, 405 U.S. at 658. However, if the unwed father does not take steps to establish a relationship, then the state may terminate his parental rights through procedures less strict than those necessary to terminate the parental rights of a mother or married father. *Lehr v. Robertson*, 463 U.S. 248, 267-268 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 255-256 (1978). The Ohio courts below effectively recognized and upheld these long held precedents.

Adoption without parental consent results in the termination of parental rights. *In re Adoption of Masa*, 23 Ohio St.3d 163, 165 (1986); *In re Schoeppner*, 46 Ohio St.2d 21, 24 (1976). Under Ohio adoption law, the consents to adopt of legal fathers and putative fathers can be excused under two different standards. Ohio Rev. Code Ann. § 3107.07(A) applies to a legal father and the question is whether he failed without justifiable cause to communicate with the minor or provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition. Ohio Rev. Code Ann. § 3107.07(B) applies to a putative father and the question is whether he abandoned the birth mother during her pregnancy and up to her time of surrender of the child.

Under Ohio Rev. Code Ann. § 3107.01(H), a man is a "putative father" if "[h]e has not been determined, prior to the date a petition for adoption is filed, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code," i.e., a paternity action. *See* Ohio Rev. Code Ann. § 3107.01(H)(3).

In re Adoption of Pushcar, 110 Ohio St.3d 332, the Ohio Supreme Court, in its syllabus, held:

> "When an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child."

The *Pushcar* decision recognized that an unwed father activated and preserved his constitutional liberty interest in a parental relationship by his registration

with the putative father registry ***and*** by his commencement of a parentage action prior to the filing of an adoption petition. The *Pushcar decision* effectively corrected a constitutional flaw in Ohio Rev. Code Ann. § 3107.01(H)(3). The act of the unwed father in filing a paternity action, and not the subsequent judicial determination of fatherhood by genetic tests, entitled the unwed father to be elevated to legal father status.

The act of filing a paternity action is a demonstrative step to establishing a custodial *and* supportive relationship with the child. A parentage action shows a commitment to the child and to the responsibilities of parenthood. By filing such an action, the unwed father voluntarily submits himself to court orders concerning the child. By filing such an action and serving process on pertinent parties, the unwed father states to the birth-mother, the prospective adoptive parents, the adoption agency and to the courts that he is present and ready to be tested for parentage and examined for fitness to the care of his child. Further, the filing a paternity action should be given greater significance where the child at issue was a newborn.

Respondent Wyrembek timely registered with the Ohio Putative Father Registry and filed a complaint to establish paternity prior to the filing of the petition for adoption. Respondent did everything legally possible to establish he was the child's father. He should not be treated differently than a man who acknowledged parentage in a situation where the birth mother was cooperative in finalizing a child's parentage. Such a different treatment would violate the equal protection guarantees of the United States Constitutions. Under

Petitioners' interpretation of Ohio Rev. Code Ann. § 3107.01(H), the birth mother and/or the prospective adoptive parents could control whether an unwed father was a legal father or a "putative father" as defined in Ohio Rev. Code Ann. § 3107.01(H). The birth mother could control the consent requirements of an unwed father by either cooperating with the parentage determination or by delaying that determination as long as possible in an attempt to cut off the man's right to object to the adoption. The prospective adoptive parents would be able to impose the "putative father" definition upon the biological father merely by filing their adoption petition in probate court before they produced the child in juvenile court for genetic testing. Also, under Petitioners' version of the statute, an unwed father could be denied legal father status merely by the juvenile court's inability to complete genetic testing prior to the filing of an adoption petition. Under Petitioners' position, Respondent's affirmative steps to protect his right to object to the adoption would go unrecognized under Ohio adoption law.

The decision of the Supreme Court of Ohio in *In re G.V.* does not conflict with the decisions of this Court regarding unwed fathers.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully request that the Court deny the Petition. The Petition filed herein is completely without merit and is a frivolous attempt to seek review of a decision of the Ohio Supreme Court that did not involve any federal constitutional issues.

Respectfully submitted,

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In the Supreme Court of the United States

IN RE ADOPTION OF G.V.

JASON AND CHRISTY VAUGHN,
Petitioners,

v.

BENJAMIN J. WYREMBEK,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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REPLY ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Under the plain and unambiguous statutory regulations governing adoptions in Ohio, Petitioners filed an adoption petition to adopt a child who had lived with them since birth, whose mother had been abandoned months before his birth by the putative father, and whose legal parents consented to the adoption. If the courts of Ohio had followed the statutory guidelines, enacted "to prevent children from being forcibly removed from their adoptive homes after a biological father belatedly exercised parental rights," this Petition would not be before the Supreme Court, Grayson's adoption would have been finalized years ago, and Grayson would not have been subjected to the unimaginable psychological harm of being ripped from the only family he ever knew and placed with a complete stranger whose only tie to him is his DNA. *Adoption of G.V.*, 126 Ohio St.3d at 258 (Cupp, J., dissenting) (citing 64 Ohio Report No. 198, Gongwer News Service, Inc (October 17, 1995) 1). Instead, the Probate Court, the Sixth District Court of Appeals, and the Ohio Supreme Court ignored the statutory regulations, the legislative intent in creating the putative father registry, and the constitutional rights of Petitioners and Grayson in dismissing a timely and appropriate adoption petition without notice, a hearing, or even a consideration of the best interests of the child. This Court should grant the Petition for Writ of Certiorari to address the due process issues raised by the Ohio Supreme Court's decision, and the incorrect interpretation of U.S. Supreme Court jurisprudence upon which the Ohio Supreme Court relied to violate constitutional due process rights.

I. THE PETITIONERS' FEDERAL QUESTIONS HAVE BEEN ADEQUATELY PRESERVED FOR REVIEW.

Respondent is woefully incorrect in arguing that Petitioners failed to preserve the first and second questions presented for review. All that is required to preserve a claim for review under 28 U.S.C. § 1257 is that a litigant "indicate the federal law basis for his claim in a state-court petition or brief ... by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)). Petitioners more than met this burden – arguing at every stage of these proceedings that their federal rights and those of the minor child, Grayson, were violated when the Probate Court, in contravention of Ohio statutory law, bestowed constitutionally protected parental rights upon Respondent, ignored the rights of Petitioners and Grayson, and dismissed the adoption petition without notice or opportunity for a hearing.

In the ruling at issue, the Probate Court held:

> Section 3107.07(B) no longer applies to Mr. Wyrembek although he was a putative father when the petition was filed.... The judicial determination of a parentage action ... changes his status in this matter and he is now a legal father and falls under the provisions of R.C. 3107.07(A).... Since one year had not expired prior to the placement of the child or the filing of the petition and one year has not expired

> since the paternity finding, it is impossible to show that Mr. Wyrembek's consent is not required pursuant to Section 3107.07(A). Accordingly, the Court finds the Petition for Adoption has been filed prematurely and therefore it is hereby dismissed.

Appx. at 52a. In appealing this ruling, Petitioners specifically argued in their fourth enumeration of error that the "due process rights of Appellants were violated" when the Probate Court changed Respondent's status from putative father to legal father after the petition for adoption was filed and dismissed the adoption petition without notice or opportunity for a hearing. Appx. at 81a (citing *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)). The Sixth Appellate District Court of Lucas County specifically addressed this Argument, affirming the dismissal by the Probate Court. Appx. at 28a.

Similarly, in appealing the decision of the Sixth Appellate District, Petitioners again raised the due process argument with the Ohio Supreme Court, alleging that Ohio's statutory scheme of a putative father registry as written adequately "protect[s] [Respondent's] due process rights"; that "children are persons with rights protected by the United States Constitution"; and that the lower courts "elevated the rights of the birth-father above the rights of all other parties in the adoption proceeding" by dismissing the adoption petition without consideration of the rights of

the other parties or best interests of the child.[1] Appx. at 94z-100a (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr*, 463 U.S. 248 (1983); *Michael H.*, 491 U.S. 110 (1989); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *In re Gault*, 387 U.S. 1, 13 (1967)).

In affirming the decision of the Sixth Appellate District and the Probate Court, the Ohio Supreme Court specifically relied on the following U.S. Supreme Court precedent: *Santosky v. Kramer*, 455 U.S. 745 (1982) (Rehnquist, J., dissenting); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (Brennan, J., dissenting); and *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996). In reliance on these opinions, the Ohio Supreme Court determined that the constitutional rights of a biological father should be superior to those of either his own biological child, or prospective adoptive parents who have raised that child since birth, and that neither prospective adoptive parents nor minor children have any constitutional rights regarding the determination of their family units.

In response to the Ohio Supreme Court's decision, Petitioners filed a motion for reconsideration based in

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[1] Petitioners also argued that the substantive and procedural due process rights of all other parties to the adoption, including Petitioners and the minor child, were violated by the lower courts in Petitioners' Memorandum in Support of Jurisdiction before the Ohio Supreme Court. Memorandum, p. 12-14 (arguing that the Probate Court violated the due process rights of all parties to the adoption proceeding by dismissing the adoption without a consideration of all relevant issues).

part on the fact that "[t]he majority did not even address any constitutional issues, although Appellants have argued constitutional issues during this entire case, including in the Probate Court, in the Court of Appeals, and in this Supreme Court." Motion for Reconsideration ("Motion"), p. 17. The Ohio Supreme Court denied the motion without an opinion. Appx. at 30a.

Even if it could be argued that Petitioners' repeated presentation of constitutional arguments in the lower courts as outlined above was somehow insufficient, Petitioners motion for reconsideration more than adequately preserved the issues. While the Court "ordinarily do[es] not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it[,] ... where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review." *Stop The Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 130 S. Ct. 2592, 2600 n. 4 (2010) (internal citations omitted). In their motion for reconsideration, Petitioners specifically argued that the majority decision of the Ohio Supreme Court erred by "effectively destroy[ing] the balance of the rights of the parties in an adoption proceeding and violat[ing] the constitutional due process rights of all parties except the alleged unsuitable biological father." Motion at 3. Petitioners went on to argue, "The question is: how does this comport "with the requirements of due process and the plain meaning of its provisions" as this Court required in *Pushcar* at 110 Ohio St. 3d 334? The answer is that it does not." Motion at 5.

Petitioners went on to cite *Lehr*, 463 U.S. at 261, regarding the due process rights of biological fathers in relation to their children, and explained how the Ohio Supreme Court misapplied U.S. Supreme Court precedent in direct contradiction to *Lehr*, arguing as follows:

> The U.S. Supreme Court stated that "the mere existence of a biological link does not merit equivalent constitutional protection." *Lehr*, 463 U.S. at 261. Therefore, the majority is wrong to cite *Santosky v. Kramer* (1982), 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Lehr*, 463 U.S. at 260. It is disheartening for the majority to cite *M.L.B. v. S.L.J.* (1996), 519 U.S. 102, 136 L.Ed.2d, 473, 117 S.Ct. 555, and discuss "family association" and "long-term impact on all the concerned parties" as if such comments somehow support Appellee's position. Appellee has no relationship, other than biological, with this child. This child has been with the Appellants his entire life. Appellants and this child have a real parent-child relationship. This child has bonded familial relationships with the Appellants, with Appellants' other children, and with Appellants' parents and other family members. If this Court is going to base[] its decision on important family association, it must consider the child's bonded relationships. This Court should ask: why did the birth-mother place this child and why does she continue[] to support the adoption? The answers to these questions would have been before this

> Court if the law had been followed by allowing the Appellants to have their day in court and present the evidence on the allegations made under the applicable statutes of R.C. 3107.07(B)(2)(b) and R.C. 3107.07(B)(2)(c). If the majority's opinion becomes the decision of this Court, Appellants and the child will be precluded from having their day in court and the alleged misdeeds of Appellee will not be addressed. Appellee was a putative father when the adoption petition was filed. Appellee's only connection to the child is that he was later determined to be the biological father....
>
> Permanency for this child is at issue and, if this Court will just acknowledge the constitutional due process rights of the parties to have this case heard, the issue will be addressed in the adoption proceeding.

Motion at 14-17.

Petitioners more than adequately "indicate[d] the federal law basis" for their claims in their motion for reconsideration, "citing in conjunction with the claim the federal source of law" on which they relied and "case[s] deciding such a claim on federal grounds." *Howell*, 543 U.S. at 444 (quoting *Baldwin,* 541 U.S. at 32). There can be no argument as to whether Petitioners raised "federal" claims during this litigation. Petitioners have consistently argued that their constitutional rights and those of Grayson have been violated by the Ohio courts, have consistently cited federal case law in support, and detailed these arguments in their motion for reconsideration which was denied by the Ohio Supreme Court. Petitioners

have preserved the first and second questions presented for review.[2]

II. PETITIONERS HANDS ARE "CLEAN" AND SHOULD NOT BE DENIED AN OPPORTUNITY TO HAVE THEIR CONSTITUTIONAL RIGHTS ADDRESSED.

Respondent argues that Petitioners do not have "clean hands" in this matter and as a result neither Petitioners nor Grayson, who Respondent conveniently refers to as a "proposed adoptee," are entitled to a determination of their constitutional rights. Response, p. 13. Such an argument ignores the actual history of this litigation. The facts in this matter show that after the birth-mother became pregnant with Respondent's child and informed him of this fact, he abandoned her, cutting off all contact. Not wanting to raise Grayson as a single parent (due to her divorce from Grayson's legal father), the birth-mother hand-selected Petitioners to be the adoptive parents of her unborn child. Grayson's legal parents surrendered custody of Grayson to Adoption by Gentle Care on November 4, 2007. ICPC approval from both Ohio and Indiana was obtained on November 7, 2007. It was not until November 20, 2007 – after Respondent learned of

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[2] To the extent this Court finds Petitioners to have not adequately preserved these issues, however, Petitioners ask this Court to decide the matter nonetheless. The Court "may make exceptions to [the] general approach to claims not raised below." *Polar Tankers, Inc. v. City of Valdez, Alaska*, 129 S.Ct. 2277, 2286 (2009). Such an exception is warranted here because "deciding the matter now will reduce the likelihood of further litigation" regarding the constitutional rights at issue in adoption and family custody cases. *Id.*

Grayson's pending adoption – that he belatedly sought to assert any parental rights at all by registering with the putative father registry. Since Respondent did not register with the putative father registry until after ICPC approval was obtained, Respondent's arguments that the ICPC placement was somehow "not legal" is baseless. *See, e.g.*, Response at 10.

Unlike the complete abandonment of the birth mother and biological child by Respondent, Petitioners were present in the delivery room when Grayson was born and took Grayson home from the hospital in accordance with the ICPC approval. At no point prior to Grayson being placed with Petitioners did Respondent attempt to care for or support the birth-mother or seek to establish a parental relationship with his newborn child.

Per the laws governing the putative father registry and adoptions in Ohio, consistent with putative father registries which have been approved by this Court and now exist in over thirty states, Respondent's consent to the adoption was not required because he was a putative father who had "willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor." Ohio Rev. Code Ann. § 3107.07(B)(2). Petitioners at all times followed the laws of Ohio, and per those laws, should have had the opportunity to finalize the adoption within months of Grayson's birth. Instead, Petitioners were forced to litigate their ability to even file their adoption petition for years, with the Ohio Supreme Court ultimately dismissing the adoption petition and denying Petitioners and Grayson any constitutional rights.

"The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Lehr*, 463 U.S. at 262. Putative fathers who make no effort to "grasp[] that opportunity and accept[] some measure of responsibility for the child's future," do not have the constitutional right to demand a voice in determining the best placement for that child. *Id.* Respondent is just such a putative father: he abandoned the birth-mother and ignored his biological child until he discovered the child had been placed for adoption. As this Court has noted,

> A parent's rights with respect to h[is] child have ... never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae,* and, critically, the child's own complementary interest in preserving relationships that serve h[is] welfare and protection.

Troxel v. Granville, 530 U.S. 57, 88 (2000) (internal citations omitted). Per the law of Ohio, Petitioners had a valid adoption petition, and should have the opportunity to seek permanent legal custody of Grayson. Instead, Petitioners' constitutional rights were ignored, Respondent was given constitutional

rights that were not his, and the adoption petition was dismissed without even a passing glance at the best interests of the child.

Petitioners have not engaged in frivolous litigation concerning a child they had no right to adopt. It is Respondent, not Petitioners, who engaged in this behavior, obtaining dismissal of a valid adoption petition over two years after it was filed and obtaining custody of Grayson in violation of the statutory law of Ohio and the constitutional rights of everyone else involved. It is Respondent, not Petitioners, who has unclean hands in this matter, fighting to have a child removed from the only home he has ever known – a child he had no interest in having a relationship with as long as he was raised by his biological mother – all for the sake of preventing his DNA from being adopted.

CONCLUSION

The Ohio Supreme Court misinterpreted U.S. Supreme Court precedent, ignored Petitioners' constitutional rights, and most importantly ignored Grayson's constitutional rights in dismissing the adoption petition. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976). "[T]o the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so too, do children have these interests, and so, too, must their interests be balanced in the

equation." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). Despite Respondent's protestations to the contrary, and the Ohio Supreme Court's incorrect decision, "children are not merely chattels belonging to their parents." *In re Bridget R.*, 41 Cal. App. 4th 1483, 1504 (1996). Grayson was entitled to have notice, a hearing, and his best interests considered prior to being removed from a valid adoptive placement, ripped from the only family he has ever known, and delivered into the hands of a stranger. It is time this Court decide whether children, and their prospective adoptive parents, have a constitutional right in preserving the sanctity of their family. Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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